CONSUMER ISSUES WITH INTERNET SERVICE: IS INDUSTRY SELF-REGULATION WORKING?

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Michael Janigan
Executive Director
August, 2004

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Executive Summary

The Internet is a key part of many consumers' lives, a development reflected in the Canadian Radio-television and Telecommunication's (CRTC) 1999 decision that defined basic telephone service to include access to the Internet at local rates.[1] According to the Treasury Board of Canada Secretariat's Government On-Line Web site, "The Internet is transforming the world in which we live."[2]

The retail Internet access market is primarily a consumer market, emphasizing the importance of effective consumer protection. Residential access revenues were 76 per cent of total access revenues in 2002.[3]

The digital divide is a key consumer issue. Although 60 per cent of households have Internet access, the household penetration is much lower for low income Canadians.[4] With respect to use of the Internet, regular use from home for the bottom income quintile is 16.5 per cent of Canadians whereas regular use by the fourth and top quintiles is 50.4 per cent and 68.2 per cent respectively. Internet use from any location increases to 23.9 per cent, 63.7 per cent and 80.9 per cent for the bottom, fourth and top quintiles respectively.[5]

Consumers' lack of confidence in the Internet is an important consumer issue. The lack of confidence flows from concerns about the safety of sensitive personal information on the Internet. A major Canadian Internet service provider's service agreement recommends that consumers not use its service for the transmission of confidential information[6], a recommendation that appears to confirm consumers' concerns.

The Internet access market is in transition from dial-up to high-speed access. In 2002, for the first time, total high-speed subscriptions exceeded dial-up subscriptions.[7] Two suppliers dominate the unregulated high-speed market: cable and telephone companies. Although wireless Internet service providers (ISP) and ISPs that resell cable modem and digital subscriber line high-speed service exist, their current role is minor – about four per cent of the market. Are

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[1] Telecom Decision CRTC 99-16, *Telephone Service to High-Cost Serving Areas*, October 19, 1999, paragraph 24. The decision means that consumers do not have to pay long distance rates to access the Internet.

[2] www.tbs-sct.gc.ca/report/gol-ged/2003/gol-ged02_e.asp

[3] *Report to the Governor in Council, Status of Competition in Canadian Telecommunications Markets, Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services*, Canadian Radio-television and Telecommunications Commission, November 2003, p.52. Derived from Table 4.22.

[4] *Unveiling the Digital Divide*, G. Sciadas, Statistics Canada, Research Paper, October 2002, p. 6.

[5] *Unveiling the Digital Divide*, G. Sciadas, Statistics Canada, Research Paper, October 2002, p. 7.

[6] *Service Agreement – Bell Sympatico High Speed, High Speed Ultra and DSL Basic Internet Service*, February 25, 2004, Sections 12, 17.

[7] *Report to the Governor in Council, Status of Competition in Canadian Telecommunications Markets, Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services*, Canadian Radio-television and Telecommunications Commission, November 2003, p. 55.

two suppliers competing for consumers' high-speed Internet access business sufficient to ensure that consumers get reasonable access, fair prices, good service, and reasonable terms of service? What about dispute resolution between a consumer and an ISP in a market controlled by two suppliers? And do two suppliers that have virtually all the market vigorously compete with each other or do they tacitly co-operate?

Although reliable consumer complaint statistics about Internet service are not publicly available, we identified complaints that include billing problems, poor technical support, and actual speeds that are less than advertised speeds. We also found that the service agreements of two major Internet service providers lacked important consumer protection elements.

At least two major ISPs' service agreements contain pre-dispute mandatory arbitration clauses, raising dangers for consumers. Mandatory arbitration clauses may result in higher costs for consumers, lack of procedural fairness, lack of transparency, exacerbate the existing contract imbalance between consumers and businesses and have minimal deterrent effect. The ISPs' pre-dispute mandatory arbitration clauses deny class actions to consumers – a very significant loss for consumers.

Consumers cannot look to a regulator for consumer protection with respect to the Internet. In 1999 the CRTC found that while some Internet applications fell under the *Broadcasting Act,* the applications did not warrant regulation.[8] According to the CRTC, the regulatory framework for the Internet has been primarily concerned with the wholesale Internet access market.[9] Retail Internet access services were forborne from regulation over five years ago during an era when high-speed Internet access was virtually non-existent. Numerous competitors to the telephone and cable companies characterized the dial-up market when the CRTC forbore from regulating retail Internet services.[10] The competitors had 47 per cent of the residential Internet access revenues in 1998. The competitors' market share has dropped to 16 per cent and, according to the CRTC, they have "very little share of the growing residential high-speed access market".[11]

An effective industry self-regulatory body does not exist. Self-regulation lies with the ISPs' customer service departments. Effective self-regulation is quasi-independent, transparent and accountable, features that understandably do not characterize customer service departments. Self-regulation does not detract from

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[8] *New Media*, Telecom Public Notice CRTC 99-14, Broadcasting Public Notice CRTC 1999-84, May 17, 1999.

[9] *Report to the Governor in Council, Status of Competition in Canadian Telecommunications Markets, Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services*, Canadian Radio-television and Telecommunications Commission, November 2003, p. 51.

[10] *Internet Forbearance*, Telecom Public Notice CRTC 98-17, July 22, 1998.

[11] *Report to the Governor in Council, Status of Competition in Canadian Telecommunications Markets, Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services*, Canadian Radio-television and Telecommunications Commission, November 2003, pp. 55, 59.

the essential role of customer service departments for consumers and for management. Self-regulation reinforces good customer service with effective and timely dispute resolution. Effective self-regulation can be done on a company basis – for example, an ombudsman – or on an industry basis (or both). Several self-regulatory models exist; they are beyond the scope of this study.

Perhaps the lack of regulation, including self-regulation, would not matter if consumers did not care. However, this is not the case. We retained POLLARA Inc. to survey consumers about regulation of Internet service. Almost two-thirds of consumers think that the government should develop and enforce consumer protection rules. Eighty-nine per cent of these consumers feel that rules for resolving disputes between businesses and consumers are very or somewhat important. More than half of consumers who want rules believe that dispute resolution rules are very important.

Consumers who believe that the government should develop consumer protection rules appear to be very concerned about Internet service providers' quality of service: 62 per cent said that it is very important to develop rules with respect to service quality while only 37 per cent felt it was very important to develop rules with respect to prices.

ISPs are the gateways to the Internet. The Public Interest Advocacy Centre's research and analysis shows that more effective self-regulation is required by ISPs in a world that is being transformed by the Internet and in a world where there are essentially two high-speed gateways. More effective self-regulation includes the removal of pre-dispute mandatory arbitration clauses from service agreements.

If ISPs do not put in place effective self-regulation, public support for the development of consumer protection rules by government may be translated into government regulation by the CRTC or a similar agency.

Background

This report identifies and analyses consumer concerns and issues with the provision of Internet service in Canada. The industry's self-regulatory initiatives are evaluated; recommendations are made to improve consumer protection.

The report does not deal with the protection of children while online, peer-to-peer file sharing[12], Voice over Internet Protocol (VoIP) telephone service, domain name administration[13] and Internet governance.

Research, including public opinion survey research, and analysis was conducted during the year ended March 31, 2004. Our research relied primarily on publicly available documents, including Web forums.

During the course of the research, we met with Internet service providers (ISPs), including senior representatives of major cable and telephone ISPs. We also spoke with current and former representatives of the Canadian Association of Internet Providers. These representatives are also employed by ISPs in senior positions. We appreciate the opportunity to obtain their comments. The interviews were granted on a confidential basis due to the commercial sensitivity of the information provided to us. As a result, our report does not identify the individuals and their companies. We have included some of their comments without attribution in our report.

Introduction

Consumers have been concerned for many years about price and quality of service issues surrounding telephone and cable television service. For example, telecommunications and broadcasting regulation has been a key concern of the Public Interest Advocacy Centre for more than 25 years.

Much has changed over 25 years with respect to telephone and cable television service. Rotary dial black telephones rented from the telephone company gave way to feature-laden touch-tone telephones owned by consumers.

Wireless telephones did not exist 25 years ago – much less cameras that are wireless telephones. In the U.S., wireless usage is almost 40 per cent of average home wireline usage.[14] According to Aliant Telecom Inc., 233,000 Canadian households have wireless telephones only.[15] TELUS Communications Inc.

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[12] For example, music downloading.
[13] For example, "domain slamming" – a marketing practice that causes a domain name owner to unwittingly switch to another registrar of domain names.
[14] *Voice Over Broadband, The Challenge from VoIP in the Residential Phone Market*, Merrill Lynch, June 24, 2003, p. 19.
[15] Forbearance Application for Residential Wireline Local Services in Specified Exchanges, Aliant Telecom Inc., April 7, 2004, para. 29.

estimates that 4.4 per cent of households in Alberta and British Columbia use wireless telephones only.[16]

Cable television grew from a few channels to hundreds of video and audio channels – and satellite companies emerged to compete with cable television companies. Television fragmented into an array of specialty channels that focus on interests ranging from extreme sports to the arts. Specialty channels are only available from cable and satellite television companies.[17] Today rabbit ears are what you find on rabbits.

Twenty-five years ago the phone company was the only game in town. Today consumers choose from competing local and long distance companies, creating new consumer issues. And today telephone companies offer television service and cable companies offer telephone service.

Regulation changed as well. Twenty-five years ago the Canadian Radio-television and Telecommunications Commission (CRTC) regulated telephone companies' profits. Today the CRTC regulates the companies' prices – and some prices are no longer regulated because monopoly markets have become competitive. Telephone companies are free to earn as much as they can as long as they abide by the CRTC's price constraints for certain services. Given the incentive to reduce costs, perhaps it is not surprising that the companies' quality of service fell under price cap regulation.[18] Cable television rates are essentially no longer regulated because the CRTC considers the broadcast distribution market to be competitive.

The Internet In Canada – Where We Are Now

Internet Catches On

While all this was happening, the Internet and the World Wide Web were invented. And unlike quadraphonic sound and the Pet Rock, the Internet and the Web caught on. According to the Treasury Board of Canada Secretariat's Government On-Line Web site, "The Internet is transforming the world in which we live. It is bringing information and services to us in our own homes, when we want them, and in ways that we could not have imagined twenty or thirty years ago."[19]

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[16] TELUS Communications Inc., response to interrogatory PN 2003-10 TELUS(CCTA)20Feb04-21 revised. This interrogatory was filed in the Canadian Radio-television and Telecommunications Commission's proceeding with respect to the review of price floor safeguards for retail tariffed service and related issues, Telecom Public Notice CRTC 2003-10.

[17] Broadcast distribution services are also available in some areas from terrestrial wireless multipoint distribution systems.

[18] Telecom Decision CRTC 2002-34, *Regulatory Framework for Second Price Cap Period*, May 30, 2002, paragraph 706.

[19] www.tbs-sct.gc.ca/report/gol-ged/2003/gol-ged02_e.asp

The Internet is now so important that the CRTC has defined basic telephone service to include access to the Internet at local rates.[20]

Google, the most popular Internet search engine, logs 200 million searches daily. According to Esther Dyson, publisher of a technology industry newsletter, "In one sense, with Google, everything is knowable now. … We can't pretend to be ignorant."[21]

The Internet has animated some potatoes to rise from their couches. According to the CRTC, "Overall, there has been a net decrease in the use of broadcast media, particularly television, commensurate with an increase in Internet use."[22] An October 2003 Decima Research Inc. survey found that Canadians, on average, spend 12.9 hours per week on e-mail, chatting and/or instant messaging, and surfing for information.[23] The survey also found that 55 per cent of Canadians who use the Internet for these purposes have decreased their usage of the telephone to a large extent or to some extent.[24]

Dramatic Change On The Horizon

According to Merrill Lynch:

> "North America's residential telephone market faces potentially dramatic changes from VoIP (Voice over Internet Protocol) technology. … We believe that VoIP could prove to be a highly disruptive technology in the residential market. Thanks to a shared voice/data/video platform, the functionality of VoIP could outstrip that of conventional telephony over time."[25]

VoIP refers to voice communications over a data network using packet-based protocols rather than dedicated circuits The "IP" in VoIP refers to the communications protocol – not necessarily to communications over the public Internet.

It is no longer necessary to have a telephone line to offer telephone service. A digital subscriber line (DSL), cable modem or other broadband connection is all that is required.

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[20] Telecom Decision CRTC 99-16, *Telephone Service to High-Cost Serving Areas*, October 19, 1999, paragraph 24. Note that the decision means that consumers do not have to pay long distance rates to access the Internet.
[21] "In Searching We Trust", *The New York Times*, March 14, 2004.
[22] *Broadcasting Policy Monitoring Report 2003*, Canadian Radio-television and Telecommunications Commission, p. 122.
[23] *Canadians' Usage and Views Regarding Telecommunications*, Decima Research Inc., October 2003, p. 46.
[24] *Canadians' Usage and Views Regarding Telecommunications*, Decima Research Inc., October 2003, p. 49.
[25]

Earlier this year Primus Telecommunications Canada Inc. launched Canada's first VoIP telephone service, TalkBroadband, at rates about 25 per cent below telephone companies' rates. According to Primus, TalkBroadband "transforms your High Speed Internet Service into a phone line – without the hassle of a service call."[26] Primus does not offer 911, 411 and operator services.

Rogers Cable Inc. announced in February 2004 that the company will deploy "an advanced broadband IP multimedia network to support digital voice-over-cable telephone and other new voice and data services across the Rogers Cable service areas." Launch of the service is scheduled for mid-2005.[27] Shaw Communications Inc. is expected to launch VoIP in the fall of 2004.[28]

Internet Access Primarily A Consumer Market

The retail Internet access market is primarily a consumer market, emphasizing the importance of effective recourse for consumers who have complaints about Internet service. Residential access revenues were 76 per cent of total access revenues in 2002. Residential revenues in 2002 grew by 33 per cent over 2001 while business revenues grew by 10 per cent.[29]

In spite of the Internet's high profile, consumer issues continue to surround telephone and cable television services. For example, itemized monthly telephone bills were not required by the CRTC until December 2003[30] and consumers have yet to receive all the productivity benefits due to them under the CRTC's price cap formula that has been in place for over five years.

Sometimes telephone, cable and Internet consumer issues are intertwined since telephone and cable companies are the major Internet service providers (ISP) – and telephone calls are made over the Internet and video is downloaded onto computers over the Internet. The intertwining of issues came to the fore last year when the CRTC directed incumbent local exchange carriers (ILEC) to, upon request, provide retail digital subscriber line (DSL) Internet service to any competitive local exchange carrier's local service customer that uses the ILEC's unbundled loops for local service.[31]

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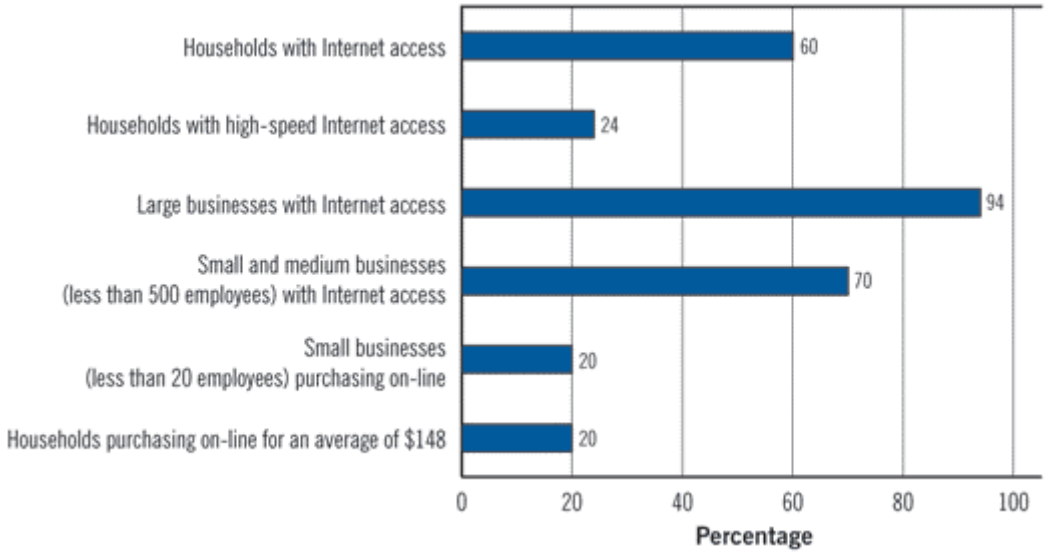
[26] Advertisement, Primus Telecommunications Canada Inc.
[27] "Rogers to Deploy Advanced Broadband IP Multimedia Network to Provide Digital Telephone and Other New Services", Media Release, February 12, 2004.
[28] "Telecom triple threat the 'revenge of cable'", *The Globe and Mail*, April 5, 2004, p. B3.
[29] *Report to the Governor in Council, Status of Competition in Canadian Telecommunications Markets, Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services*, Canadian Radio-television and Telecommunications Commission, November 2003, p.52. Derived from Table 4.22.
[30] Telecom Decision CRTC 2003-86, *Bell Canada and Aliant Telecom In. – Show Cause on the Issuance of monthly itemized billing statements – Follow-up to Decision 2002-34*, December 22, 2003.
[31] *Call-Net Enterprises Inc. – Request to lift restrictions on the provision of retail digital subscriber line Internet services*, Telecom Decision CRTC 2003-49, July 21, 2003.

Key facts about Internet use in Canada in 2001



Source: Report of the Auditor General of Canada – November 2003

Digital Divide Key Consumer Issue

Although 60 per cent of households have Internet access, the household penetration is much lower for low income Canadians.[32] With respect to use of the Internet, a 2002 Statistics Canada research paper reported that regular use from home for the bottom income quintile is 16.5 per cent of Canadians whereas regular use by the fourth and top quintiles is 50.4 per cent and 68.2 per cent respectively. Internet use from any location increases to 23.9 per cent, 63.7 per cent and 80.9 per cent for the bottom, fourth and top quintiles respectively.[33]

The Internet use data in Statistics Canada's research paper are consistent with the results published in a 2000 report, *The Dual Digital Divide, The Information Highway in Canada*, by the Public Interest Advocacy Centre. The Centre's report found that "higher income households were about three times more likely than lower-income households to have home access [to the Internet.]"[34]

The digital divide is an important consumer issue. According to a Statistics Canada research paper:

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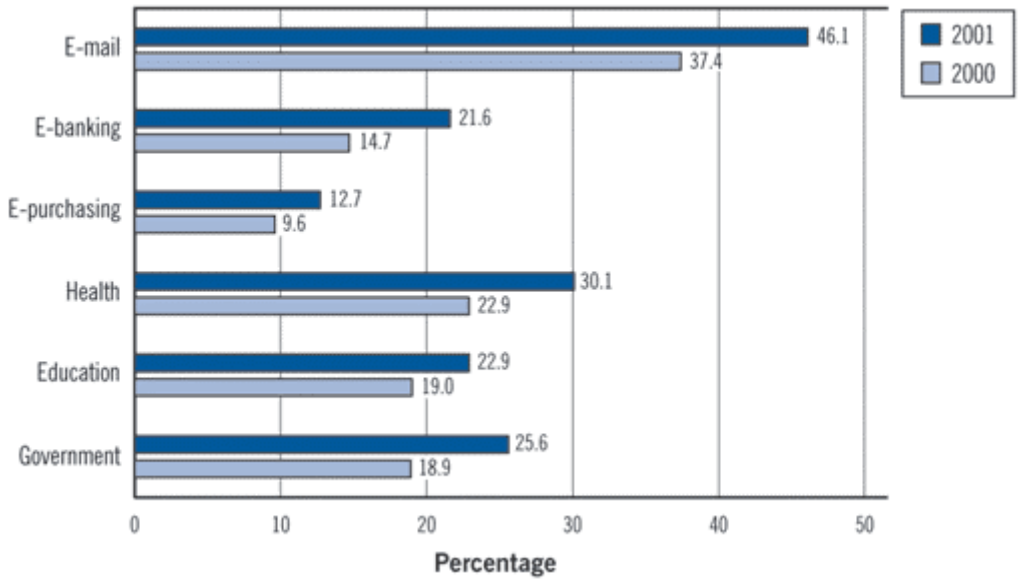
[32] *Unveiling the Digital Divide*, G. Sciadas, Statistics Canada, Research Paper, October 2002, p. 6.
[33] *Unveiling the Digital Divide*, G. Sciadas, Statistics Canada, Research Paper, October 2002, p. 7.
[34] *The Dual Digital Divide, The Information Highway in Canada*, Andrew Reddick, principal author and co-investigator, Public Interest Advocacy Centre, 2000, p. 8.

"In the end, the issue of the Digital Divide, like all others, will come down to outcomes and impacts. "The fundamental digital divide is not measured by the number of connections to the Internet, but by the consequences of both connection and lack of connection" Castells (2001, p. 269). In examining such consequences, though, the degree of connectivity matters."[35]

How Canadians Use The Internet At Home



Source: Report of the Auditor General of Canada – November 2003

Current Consumer Concerns

A Disquieting Development

E-mail is by far the primary use of the Internet at home, a disquieting development for advocates of e-commerce and government services on-line. The Auditor General of Canada recently noted, "Governments face the considerable challenge of improving take-up rates [of government on-line services] to justify the large investment in the [on-line] services."[36] The Canadian government's investment is $880 million for implementing key on-line services by 2005.[37] According to the Auditor General:

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[35] *Unveiling the Digital Divide*, G. Sciadas, Statistics Canada, Research Paper, October 2002, p. 18.
[36] *Report of the Auditor General of Canada to the House of Commons*, Chapter 1, Information Technology: Government On-Line, November 2003, p. 1.
[37] *Report of the Auditor General of Canada to the House of Commons*, Chapter 1, Information Technology: Government On-Line, November 2003, p. 2.

> "In a survey conducted early in 2001, only 15 percent of Internet users said that they would be willing to provide their credit card number over the Internet, and only 12 percent said that they would transmit their bank account number. These figures may explain why more that a third of regular Internet users say that they would prefer traditional methods of service whenever it is necessary to divulge personal information."[38]

With respect to paying for goods and services online, Statistics Canada reported in 2003, "More than three-quarters of the 2.3 million households that paid online indicated that they were concerned, or very concerned, about financial transactions conducted over the Internet."[39]

Consumers' concerns about financial transactions conducted over the Internet appear to be reflected in their use of traditional cheques. According to Custom Direct, a major U.S. cheque printer, cheque transactions have been stable in the U.S. since 1990. Cheques accounted for 59 per cent of all U.S. non-cash transactions in 2000.[40]

An Ipsos-Reid survey found that 2003 Christmas online sales fell for the second consecutive year. The decline was almost two per cent from the previous year. An Ipsos-Reid vice-president noted that Canadians appear to be concerned about security issues surrounding the Internet.[41]

Major ISP Recommends Against Transmission of Confidential Information

The Bell Sympatico service agreement falls short of a ringing endorsement for the safety of personal information on the Internet. The agreement states: "Your Service Provider cannot ensure or guarantee privacy for users of the Service. It is therefore recommended that the Service not be used for the transmission of confidential information. … Your messages may be the subject of unauthorized third party interception and review."[42] If a major ISP recommends that its service not be used for confidential information, consumers' concerns about privacy and security seem to be well placed.

Consumers are Vulnerable

Consumers appear to lack confidence in the safety of sensitive personal information on the Internet – or, in other words, consumers appear to feel

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[38] *Report of the Auditor General of Canada to the House of Commons*, Chapter 1, Information Technology: Government On-Line, November 2003, p. 24.
[39] *The Daily*, Statistics Canada, December 11, 2003.
[40] Custom Direct. According to Custom Direct, the data are from a Federal Reserve Bank Payment study released in 2002. See [www.cdifund.com].
[41] "Well-wired Canadians shun e-commerce", *The Ottawa Citizen*, January 27, 2004, p. D1.
[42] *Service Agreement – Bell Sympatico High Speed, High Speed Ultra and DSL Basic Internet Service*, February 25, 2004, Sections 12, 17.

vulnerable when they use the Internet to transmit and store sensitive personal information.[43]

Ongoing security issues with the operating system found on most personal computers compound the feeling of vulnerability. According to Symantec Corp., an on-line security company, the company expects a bug that will target a new unreported software flaw, possibly causing widespread damage.[44] (If the flaw is unreported, a security patch will not exist.)

Consumers also feel vulnerable with respect to computer viruses, trojans, worms, spyware[45], pop-up ads, and growing identity theft issues.[46] Symantec recently reported that the volume of malicious computer worms and viruses appears to have peaked. However, according to the company, the complexity of new computer bugs and the threat they pose is getting worse.[47] According to a recent report, North American ISPs will spend $245 million fighting viruses in 2004, a cost that is ultimately passed along to customers.[48]

Competition in High-Speed Access Important Consumer Issue

In addition to understanding the penetration and usage of Internet service, the Digital Divide and the vulnerability of consumers, the degree of competition in the provision of Internet service is also important. Markets that are characterized by monopoly or oligopoly give rise to complex consumer issues.

Two Markets

The market for Internet service is, in fact, two markets: dial-up and high-speed.[49] According to the U.K.'s communications regulator, Ofcom, "The market for broadband is distinct from that for dial-up internet access."[50] A recent Statistics Canada research paper said:

> "Broadband expands the realm of *how much* information can be sent over a computer network and *how readily* that information is available. It enables applications that are simply not possible with "dial-up" methods of

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[43] On the other hand, 43 per cent of income tax returns are filed electronically, according to Canada Customs and Revenue Agency.
[44] "Net virus spread may have peaked: report", *The Globe and Mail*, March 15, 2004, p. B3.
[45] Some file-sharing programs install other software known as spyware. Spyware monitors a user's browsing habits and then sends that data to third parties. Sometimes the user gets ads based on the information that the spyware has collected and disseminated. Spyware can be difficult to detect and remove.
[46] See *Identity Theft: The Need for Better Consumer Protection*, Public Interest Advocacy Centre, November 2003.
[47] "Net virus spread may have peaked: report", *The Globe and Mail*, March 15, 2004, p. B3.
[48] "Extra cost of fighting viruses costs ISPs $245M", *The Ottawa Citizen*, March 16, 2004, p. D7.
[49] The CRTC divides high-speed into wideband (up to 1.5 megabits per second) and broadband (faster than 1.5 megabits per second).
[50] http://www.ofcom.org.uk/media_office/latest_news/nr_20031216?a=87101

> Internet access, which use a standard telephone line and standard modem. … Broadband technologies can, however, be distinguished from the more traditional method of "dial-up" Internet access by several key functional characteristics. These include access speed, 2-way transmission, and 'always-on' connectivity. Each of these characteristics affects the types of applications broadband can support and the way the Internet is used. … Unlike dial-up connections, the Internet is always immediately available, and there is some evidence that this changes patterns of Internet use."[51]

Dial-up Internet access uses a telephone line and a standard modem. Dial-up access is also referred to as narrowband or low-speed access. High-speed or broadband access refers to cable modems or DSL, the most common broadband access technologies.[52] According to the CRTC, low-speed and broadband access services operate at speeds up to 64 kilobits per second and over 1.5 megabits per second respectively.[53] DSL and cable Internet access providers introduced "high-speed lite" services in 2002, providing always-on connections at slower transmission speeds than non-lite high-speed access.

High-Speed Competition In Trouble?

The Statistics Canada research paper noted above observed that a "high level of competition exists between cable and DSL high-speed Internet services in Canada."[54] However, this observation does not jibe with the CRTC's analysis of the current state of competition in the Internet service market. The cable companies' and the ILECs' shares of the access market in 2002 were 36 per cent and 41 per cent respectively.[55] In other words, two suppliers controlled 77 per cent of the market. Compounding this problem, the other competitors' 2002 market share has been cut in half since 1998.[56]

According to the CRTC, the other competitors' "market share losses were most pronounced in the residential market segment, where competitors' market share dropped from 47% to 16% between 1998 and 2002. The sharp decline is largely

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[51] *High-speed on the Information Highway: Broadband in Canada*, B. Veenhof, P. Neogi and B. van Tol, Statistics Canada, Research Paper, September 2003, pp. 3, 5, 6. Emphasis in original.
[52] Broadband access can also be provided by fibre optic cables and satellite and terrestrial wireless technologies.
[53] *Report to the Governor in Council, Status of Competition in Canadian Telecommunications Markets, Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services*, Canadian Radio-television and Telecommunications Commission, November 2003, p. 49.
[54] *High-speed on the Information Highway: Broadband in Canada*, B. Veenhof, P. Neogi and B. van Tol, Statistics Canada, Research Paper, September 2003, p. 10.
[55] *Report to the Governor in Council, Status of Competition in Canadian Telecommunications Markets, Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services*, Canadian Radio-television and Telecommunications Commission, November 2003, p. 52.
[56] *Report to the Governor in Council, Status of Competition in Canadian Telecommunications Markets, Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services*, Canadian Radio-television and Telecommunications Commission, November 2003, p. 52.

explained by the fact that competitors have very little share of the growing residential high-speed access market. … In 2002, for the first time, total high-speed exceeded dial-up subscriptions."[57]

Two Primary Suppliers in the High-Speed Market

The competitors to the cable companies and the ILECs had only four per cent of the DSL market and virtually zero percent of the cable high-speed market in 2002.[58]

The primary ISP competitors to the cable companies and the ILECs appear to be Primus Telecommunications Canada, Echo Online Internet, Inc., and Cybersurf Corp. Primus's high-speed service is available in Ontario and Quebec.[59] According to its Web site, Echo Online provides high-speed service in southern Ontario.[60] Cybersurf's high-speed service does not appear to be currently available across Canada.[61] Broadband wireless Internet services have been launched in some areas by iFido and a venture created by Allstream Inc., Inukshuk Internet Inc. and NR Communications, LLC.[62] AOL Canada Inc. announced earlier this year that the company plans to trial broadband wireless Internet access in certain areas of Toronto.[63]

Is an ISP market dominated by telephone and cable companies sufficient to ensure that consumers get reasonable access, fair prices, good service, and reasonable terms of service? What about dispute resolution between a consumer and an ISP in a market dominated by two suppliers? And do two suppliers that have virtually all the market vigorously compete with each other or do they tacitly co-operate?

Birds of a Feather?

Bell Sympatico's DSL Basic and Rogers' Hi-Speed Internet Lite are both $29.95 a month for the same upload and download speeds. The companies' high-speed services are both $44.95 although Rogers' upload and download speeds are

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[57] *Report to the Governor in Council, Status of Competition in Canadian Telecommunications Markets, Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services*, Canadian Radio-television and Telecommunications Commission, November 2003, p. 55.
[58] *Report to the Governor in Council, Status of Competition in Canadian Telecommunications Markets, Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services*, Canadian Radio-television and Telecommunications Commission, November 2003, p. 59.
[59] www.primustel.ca
[60] www.eol.ca
[61] www.cybersurf.net
[62] "Allstream, Inukshuk Internet and NR Communications launch new broadband wireless access network in Richmond, British Columbia", news release, March 4, 2004.
[63] "AOL Canada to trial new wireless high speed internet access technology with new venture", news release, March 10, 2004.

higher than Bell's speeds.[64] However, Bell recently announced that Sympatico will increase its speeds to match Rogers' speeds.[65] The extent to which variances in advertised high-speed upload and download speeds are important to consumers is not clear since these speeds often appear not to be achieved[66] – and the speeds are not guaranteed. Rogers' Web site states, "The [Rogers] system is configured to provide these maximum modem capabilities within Rogers' own network. Actual speeds on-line will vary with Internet traffic, server or other factors." Bell Sympatico's service agreement states, "Your Service Provider does not guarantee the performance of the Service. Speed is a function of the bottlenecks experienced upon the wider architecture of the Internet itself. As such your Service Provider does not guarantee the maximum Service performance (thoughput speeds) levels."[67]

Sympatico's and Rogers' promotions to attract new customers are virtually identical. Both companies offer two months free service and a security package.[68] In addition, the companies' bundles of services are remarkably similar. For example, Bell's Sympatico & Mobility bundle (DSL Basic and wireless) is the same price as Rogers' Wireless & Hi-Speed Internet Lite bundle. Bell's Sympatico, ExpressVu & Mobility bundle (DSL Basic, satellite TV, and wireless) is the same price as Rogers' Wireless & Ultimate TV Pak & Hi-Speed Internet Lite bundle.[69]

More Than An Internet Customer?

According to major ISPs, the similarity in rates reflects a state of intense competition between cable and telephone company ISPs. According to the ISPs, the other company immediately matches one company's offer and, as a result, rates, promotions and service bundles are virtually the same.[70] One major ISP pointed out that Internet service pricing and customer service are highly competitive because cable and telephone companies often offer television and wireless telephone services. And, as discussed earlier, two major cable companies have announced that they will introduce wireline telephone service in competition with the telephone companies. As a result, according to the major

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[64] Bell's and Rogers' Web sites, March 29, 2004. Both companies offer promotions to new customers. Non-cable customers pay an additional $5 and $10 for Rogers Hi-Speed Internet Lite and Rogers Hi-Speed Internet respectively. Bell offers High Speed Ultra service that matches Rogers Hi-Speed Internet service's speeds. The monthly rate is $69.95. Rogers offers a 10 per cent discount on Internet service to the company's VIP customers – customers who subscribe to a package of the company's services, including cable television.

[65] www.digitalhomecanada.com

[66] Based on a review of user forums. User forums are discussed later in the report.

[67] *Service Agreement – Bell Sympatico High Speed, High Speed Ultra and DSL Basic Internet Service*, February 25, 2004, Section 10.

[68] Bell Sympatico's and Rogers' Web sites April 13, 2004. Rogers' service must be ordered online to receive the free service. Bell Sympatico offers three months free security service; Rogers offers two months free security service.

[69] Bell's and Rogers' Web sites April 13, 2004.

[70] Confidential interviews by the Public Interest Advocacy Centre.

ISP, cable and telephone companies cannot risk alienating customers with poor Internet service and unfair prices. An Internet customer is often more than an Internet customer, according to the ISP.

U.S. Consumer Advocates Express Concern

Mark Cooper, director of research for the Consumer Federation of America, recently commented on the implications of the U.S. Federal Communications Commission's decision not to require local phone companies to share parts of their networks with rivals. "The implication to the consumer is that the Bells aren't going to let people use their networks, and we'll have two crummy [cable and telephone company] incumbents who don't compete with each other a great deal. There are not enough ISPs competing for my business, and that's the competition that drove and created a consumer friendly Internet. That's what we're losing."[71]

In 2001 Consumers Union and the Consumer Federation of America wrote the U.S. House Committee on Judiciary, expressing concern about the lack of price competition in the high-speed Internet access market dominated by two suppliers:

> "Cable and telephone companies have recently boosted prices by up to 25 percent for high-speed Internet services. These companies used to claim that they wanted to compete against one another and challenge each other to offer consumers better deals for high-speed services. But the only price war between them today is the race to raise rates. A marketplace dominated by the cable and local phone industries is not competitive enough to keep prices in line."[72]

On the other hand, as discussed above, competitors to the cable and ILEC ISPs exist in some areas of Canada. Primus's high-speed service is $44.95 per month after a four-month promotional period – the same rate as Bell Sympatico and Rogers.

No Regulatory Protection

Consumers cannot look to a regulator for consumer protection with respect to the Internet. In 1999 the CRTC found that while some Internet applications fell under the *Broadcasting Act,* the applications did not warrant regulation.[73] According to

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[71] "Court rebuffs FCC's new telecom rules", News.Com, March 2, 2004. http://news.com.com/2100-1034_3-5168628.html?tag=nefd_lede

[72] Letter to The Honourable James Sensenbrenner, U.S. House Committee on Judiciary, June 7, 2001.

[73] *New Media*, Telecom Public Notice CRTC 99-14, Broadcasting Public Notice CRTC 1999-84, May 17, 1999.

the CRTC, the regulatory framework for the Internet has been primarily concerned with the wholesale Internet access market.[74]

Retail Internet access services were forborne from regulation over five years ago during an era when high-speed Internet access was virtually non-existent. Numerous competitors to the telephone and cable companies characterized the dial-up market when the CRTC forbore from regulating retail Internet services.[75] The competitors had 47 per cent of the residential Internet access revenues in 1998. As noted earlier, the competitors' market share has dropped to 16 per cent and, according to the CRTC, they have "very little share of the growing residential high-speed access market".[76]

One wonders if the CRTC's 1999 statement that "it has repeatedly found that the retail Internet service market is highly competitive and dynamic"[77] is applicable today in light of the transition to a high-speed market dominated by two suppliers.

What Are Consumers Facing?

Consumers face an Internet service market that is:

- in transition from dial-up to high-speed access. In 2002, for the first time, total high-speed exceeded dial-up subscriptions;
- dominated by two suppliers, cable and telephone companies, and
- without regulation.

Canada also faces an Internet service landscape characterized by a significant digital divide. Low income Canadians have low use of the Internet, an important issue for governments hoping to transfer government services on-line. In addition, as discussed earlier, consumers appear to have little confidence in the security and privacy of sensitive personal information on the Internet. Consumers are also becoming more vulnerable to software security flaws, worms, trojans, viruses, and spyware.

Consumers are also facing a slow moving public policy and regulatory environment with respect to addressing Internet consumer issues. For example, the CRTC has not turned its mind to the concentration of ownership over the last five years in the Internet access business, particularly the high-speed component. Apparently the Commission is relying on its 1999 statement (quoted earlier) that the retail Internet service market is highly competitive and dynamic –

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[74] *Report to the Governor in Council, Status of Competition in Canadian Telecommunications Markets, Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services*, Canadian Radio-television and Telecommunications Commission, November 2003, p. 51.
[75] *Internet Forbearance*, Telecom Public Notice CRTC 98-17, July 22, 1998.
[76] *Report to the Governor in Council, Status of Competition in Canadian Telecommunications Markets, Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services*, Canadian Radio-television and Telecommunications Commission, November 2003, pp. 55, 59.
[77] *Forbearance from Retail Internet Services*, Telecom Order CRTC 99-592, June 25, 1999, paragraph 5.

a conclusion that was reached before the emergence of high-speed access and before the significant decline of competitors to the cable and telephone companies in the high-speed market. The extension of Internet service to remote areas is a focus of government programs[78] but the extension of service to low income Canadians receives little or no attention.

Spam And More Spam

Unsolicited e-mail messages or spam are clogging consumers' in-boxes. Research firm Gartner Inc. estimates spam will account for 60 per cent of all e-mail by the middle of 2004.[79] The spam assault has led to the widespread introduction of spam filters by businesses and ISPs which in turn has led to one out of every five non-spam e-mail messages not reaching its intended recipient – "a shocking situation", according to technology analyst Rick Broadhead.[80] Last year an AT&T WorldNet filter created unwanted problems for the company's subscribers:

> "Late Wednesday night, [AT&T WorldNet] instituted a new junk e-mail rule in an attempt to stanch an ever-rising tide of unsolicited commercial messages to subscribers, which number in the millions. But because of the unreliable nature of the technique, some messages from friends and colleagues to AT&T subscribers were never delivered, without either sender or recipient being notified of the missed message."[81]

A Canadian – and perhaps a global – solution to the spam problem appears to be years away:

> "A California Internet service provider has fired the first salvo under new U.S. anti-spam legislation, suing the operator of home-improvement website BobVila.com for violating the Can-Spam Act.
>
> "Meanwhile, Industry Canada is putting the finishing touches on the spam policy review it has been working on since 2002.
>
> "But don't expect a quick victory against the endless tide of diploma offers, penis-enlargement ads and get-rich-quick schemes clogging your in-box. 'It's going to take years to clean this stuff up," said Peter Ferguson, director of e-commerce policy at Industry Canada."[82]

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[78] For example, see the federal government's National Satellite Initiative announced October 5, 2003.
[79] "This old spam: Get used to it, Canada", *The Ottawa Citizen*, March 9, 2004, p. D1.
[80] "Ban spam: e-nough is e-nough", Rick Broadhead, *The Globe and Mail*, March 16, 2004, p. A15.
[81] "AT&T spam filter loses valid e-mail", CNET News.com, January 24, 2003.
[82] "This old spam: Get used to it, Canada", *The Ottawa Citizen*, March 9, 2004, p. D1.

In December 2003 New York State filed a lawsuit against some of the world's largest spammers "for sending junk emails to consumers while hiding behind fake identities, forged email addresses, and a worldwide network of more than 500 compromised computers."[83] The state's action was launched after an initial investigation by Microsoft Corporation.

Complaint Statistics

Reliable consumer complaint statistics about Internet service in Canada are not publicly available. As the CRTC has stated with respect to telephone service, complaint statistics are "a useful tool for monitoring quality of service".[84] The Commission requires incumbent local exchange carriers to report complaint statistics to the Commission.[85]

As noted earlier, low-speed and high-speed retail Internet services were forborne from regulation by the CRTC over five years ago and, as a result, the Commission does not maintain complaint statistics.

Although reliable consumer complaint statistics are not available, anecdotal information about an ISP's performance is available to diligent consumers who wade through discussion forums on certain Web sites. For example, CanadianISP.com and the Residential Broadband Users' Association have forums on their Web sites that discuss ISPs' performance.

Based on the Public Interest Advocacy Centre's review of discussion forums and other sources of information, consumers have the following complaints about ISPs' service:

- Billing problems
- Installation delays
- Service outages
- Connection problems
- Actual speed less than advertised speed
- Slow speed at peak usage times
- Technical support
    - Lack of competence
    - Difficult to contact
- E-mail
    - Deletion of archived e-mail

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[83] "State Lawsuit Attacks Spammers' Fraudulent Emails", Press Release, Office of the New York State Attorney General Eliot Spitzer, December 18, 2003.

[84] Decision CRTC 2000-24, *Final standards for quality of service indicators for use in telephone company regulation and other related matters*, January 20, 2000, paragraph 33.

[85] Decision CRTC 2000-24, *Final standards for quality of service indicators for use in telephone company regulation and other related matters*, January 20, 2000, paragraphs 33-34.

    - Holding senders' email without notifying senders when recipients' accounts suspended
    - Limitations on attachment size
    - Spam
- Ignored complaints
- Disconnecting high bandwidth users
- Difficulty cancelling service
    - Billing continues after cancelling
- High prices

Rate your ISP

The CanadianISP.com Web site allows consumers to search for an ISP and to rate their ISP, if the ISP participates in the Web site, on five factors: Internet access, e-mail, newsgroups, technical support, and overall. The factors do not include important quality of service matters such as billing accuracy and complaint handling. The reviews are averaged to generate numerical ratings; the ratings are viewed on the Web site's page for each ISP. Many of the user ratings are based on a small number of reviews. In addition, most consumers are likely not aware of CanadianISP.com and, as a result, do not take the opportunity to rate their ISPs. Although the Web site states it includes 87 per cent of all ISPs in Canada, the major cable ISPs do not appear to participate.

User reviews and ratings of Canadian ISPs, including Rogers, Shaw, Videotron, TELUS and Bell Sympatico, are available on the U.S. BroadbandReports.com's Web site. For example, on April 5, 2004, there were 191 and 427 reviews for Rogers and Bell Sympatico respectively. The services are rated on six factors: pre-sales information, install co-ordination, connection reliability, technical support, services, and value for money.[86] According to the Web site, "Scores are composite of all reviews received to date, with a much higher weighting given to recent reviews than older reviews. Additional factors such as the how frequent a site user the reviewer is, whether they emailed the review to us or registered at the site, are also taken into account when weighting scores." ISPs are awarded bronze, silver and gold awards based on the companies' performance derived from users' reviews. ISPs can use the award logo on their Web sites. Like CanadianISP.com, most consumers are probably not aware of BroadbandReports.com and, as a result, do not take the opportunity to rate their ISPs.

[86] Users give each factor a rating that ranges from one (worst) to five stars (best). Users can also provide written comments. As described above, the star ratings appear to be converted into percentage ratings, taking into account factors such as whether or not the star ratings are recent.

BROADBANDREPORTS.COM SIX MONTH RATING AS OF MARCH 24 2004				
	Bell Sympatico %	**TELUS %**	**Rogers %**	**Shaw %**
Pre-sales information	78	74	66	69
Install co-ordination	80	75	72	80
Connection reliability	87	70	66	75
Tech support	65	61	49	65
Services	76	72	62	73
Value for money	79	73	59	73

The CRTC employs a customer satisfaction objective of 90 per cent with respect to the incumbent local exchange carriers[87], a standard that major ISPs in the table above do not appear to be achieving *based on BroadbandReports.com's user reviews*. However, it would be potentially misleading to draw conclusions based on anecdotal and informal user reviews. It should also be noted that many of the CRTC's quality of service indicators require specific measurements of performance rather than the subjective appraisals given by consumers in BroadbandReports.com's Web site.

Current and Potential Consumer Remedies For ISP Service Problems

Who You Going To Call? Ghostbusters?

Consumers with a complaint can turn to their ISPs' customer service departments for help. Undoubtedly many complaints are resolved in this manner. In addition, "unofficial" company specific Internet support and discussion forums exist primarily for technical problems.[88] However, some complaints go unheeded for a variety of reasons. For example, the ISP may not see the complaint as justified or the customer service department may not be easily accessible or it may mishandle the complaint. A recent newspaper consumer help column dealt with a complaint by an ISP customer. The ISP did not reply to a letter from the consumer that set out the complaint. Intervention by the consumer help column led to a refund of $106.95.[89]

Interviews by the Public Interest Advocacy Centre with major ISPs revealed that the ISPs have an internal process whereby consumers can escalate complaints to senior management for resolution. One major ISP stated that an internal

[87] Telecom Decision CRTC 97-16, *Quality of Service Indicators for Use in Telephone Company Regulation*, July 24, 1997.
[88] See, for example, www.broadbandreports.com. The Canadian forums on this site have 103,000 active users.
[89] "Internet provider apologizes", Action Line, *The Ottawa Citizen*, March 15, 2004, p. B2.

ombudsman is available to consumers although the company's Web site provides no indication that consumers have recourse to an ombudsman. In addition, the ISP's regulatory department rather than a quasi-independent individual performs the ombudsman function. As discussed later, Rogers has a mandatory arbitration clause with respect claims and disputes in the company's agreement with its ISP customers.

Canadian Association of Internet Providers

The Canadian Association of Internet Providers (CAIP) is a "strong supporter of Internet self-regulation", according to its Web site. The major cable ISPs are not members of CAIP, a shortcoming since the association's self-regulatory initiatives, including policies and codes, do not apply to cable ISPs' customers.

CAIP's Web site includes a *Fair Practices Policy Statement* and a *Code of Conduct*. The *Code of Conduct* is voluntary for CAIP's members. The code sets out seven general principles that deal with education, privacy and content. The code also requires CAIP members to comply with the law and to cooperate with government officials, international organizations and law enforcement agencies "seeking to clarify the responsibilities for each of the different functions performed by Internet companies."[90]

The *Fair Practices Policy Statement* contains six policies, requiring members to among other things:

- provide customer service with respect to sales, technical, billing and complaints;
- establish procedures for responding to customer inquiries and complaints;
- describe their products and services accurately;
- work to resolve disputes with customers and members of the public;
- provide a stable and secure Internetwork;
- treat their peers with courtesy;
- not knowingly host illegal content, and
- not knowingly allow the transmission of spam.

With respect to consumer complaints and effective industry self-regulation, CAIP's policy statement is not adequate because the statement does not provide customer service standards. As a result, service benchmarks do not exist against which to evaluate consumers' complaints. In addition, CAIP does not appear to have an industry ombudsman or similar body to receive and deal with consumer complaints. Unlike the Cable Television Standards Council (discussed below), CAIP's Web site does not provide an opportunity for consumers to submit a complaint.

[90] Code of Conduct, Canadian Association of Internet Providers.

Customer Service Benchmarks Can Be Developed

Although developing industry customer service standards sounds like a daunting task, it can be done. First, interviews by the Public Interest Advocacy Centre with major ISPs revealed that the companies have internal standards. Second, the Cable Television Standards Council developed cable customer service standards for its members in consultation with consumers. For example, large cable companies must answer 80 per cent of telephone calls by staff or an Automated Information Service within 20 seconds. With respect to service outages, 90 per cent of outages must be corrected within four hours. Where appropriate, standards vary with the size of the cable company. As discussed later, Australian ISPs have developed and made public certain customer service standards.

The *Canadian Code of Practice for Consumer Protection in Electronic Commerce* contains "benchmarks for good business practice for merchants conducting commercial activities with consumers online."[91] Federal, provincial and territorial Ministers responsible for consumer affairs endorsed the code on January 16, 2004. Among other things, the e-commerce code requires vendors to offer a complaints-handling process that:

- is easily accessible online and offline;
- records and monitors complaints, and
- endeavours to resolve or address complaints within 45 days.

The code also strongly encourages a vendor to offer a dispute resolution service, stating the service shall make public the number and type of complaints and the proportion resolved in the customer's favour.

Cable Television Standards Council

The Cable Television Standards Council, a cable industry self-regulatory body, receives complaints about member cable companies that provide Internet service. Two major cable companies that provide Internet service, Shaw and Videotron, are not members of the Council. For the year ended August 31, 2003, the Council dealt with 335 Internet service complaints about its members. Analysis of complaints is not publicly available because the Council and its members consider the information commercially sensitive for competitive reasons.

For the year ended August 31, 2003, the Council dealt with 1,151 complaints about cable service. The Council forwards a consumer's cable complaint to the relevant member, requesting the company to respond to the consumer within 14 days. If the consumer remains dissatisfied, the Council pursues the matter with the cable company. If the complaint remains unresolved, the Council reviews the

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[91] *Canadian Code of Practice for Consumer Protection in Electronic Commerce*, January 16, 2004. Available at [http://cmcweb.ca]

case in the context of its standards, providing the consumer and the company with its decision.

Unlike cable television service (and like CAIP), the Council does not have customer service standards for Internet service and, as a result, its adjudicating body of industry and consumer representatives does not rule on Internet service disputes between consumers and its members. However, the Council's staff will informally mediate disputes between consumers and its members with respect to Internet service.

If all the major cable companies were members of the Council and if the Council developed adequate Internet customer service standards in consultation with consumers, the Council could play a valuable consumer protection role with respect to cable ISPs.

Mandatory Arbitration Clause

With respect to arbitration, Rogers Cable Communications Inc.'s *End User Agreement* and Shaw Communications Inc.'s *Terms of Use* include mandatory arbitration clauses. The clauses deals with "any claim, dispute or controversy". The claim, dispute or controversy is referred to a sole arbitrator. Consumers are required by the clauses to "waive any right you may have to commence or participate in any class action against us related to any Claim and, where applicable, you also agree to opt out of any class proceedings against us."[92]

Mandatory arbitration dominates business to consumer agreements in the United States. Research by the Public Interest Advocacy Centre in an upcoming report, *Mandatory Arbitration in Consumer Contracts*, suggests that mandatory arbitration clauses contain a number of dangers for consumers. Mandatory arbitration clauses may result in higher costs for consumers, lack of procedural fairness, lack of transparency, exacerbate the existing contract imbalance between consumers and businesses, and have minimal deterrent effect.

Rogers' and Shaw's agreements contain a pre-dispute mandatory arbitration clause. This clause is presented to consumers in a standard-form contract, which the consumer signs onto, without negotiating its terms, including mandatory arbitration. The consumer often does not know or understand the implications of assenting to such a clause. This is very different from post-dispute voluntary arbitration clauses in which the consumer has had the opportunity to understand the nature of his or her claim and can weigh the costs and benefits of both arbitration and court litigation.

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[92] *End User Agreement, Agreement for Rogers Internet Access Services*, Rogers Cable Communications Inc., paragraph 22; *Terms of Service*, Shaw Communications Inc., paragraph 18.

The explicit denial of class actions is a very significant loss for consumers. Class actions, which aggregate of a number of individual claims over a common issue, can be a significant tool for consumers. They create important economies of scale, helping to overcome the general imbalance between an individual consumer attempting to litigate a small claim against a much larger business or corporation. They also optimize deterrence. A large class and a large potential claim create the optimal conditions to force a business to invest in the required changes in a produce or service to prevent the harm or breach from occurring in future.

It is important to add that provincial consumer protection law may offer some relief from mandatory arbitration clauses. Ontario's *Consumer Protection Act, 2002* contains some very important protections for consumers regarding mandatory arbitration clauses. Section 7 of the Act limits the effect of a term of a consumer contract that requires mandatory arbitration and section 8 of the Act protects a consumer's right to commence a class proceeding. These sections should operate to nullify mandatory arbitration clauses in all consumer contracts in Ontario. This Act, although passed by the legislature, has not yet been proclaimed. Once in force, this statute should insure that consumers in Ontario are free to initiate and participate in class actions free from the bounds of arbitration.

In Quebec, Article 3149 of the Civil Code similarly protects consumers by rendering ineffective any clause in a consumer contract that might prohibit an individual from referring a matter to the court.

Other Countries Monitor and Regulate

Other countries have put in place mechanisms to monitor complaints about ISPs – and to take corrective action. For example, Ofcom, the U.K. communications regulator, uses survey research to monitor satisfaction with residential Internet service. An August 2003 report found 90 per cent overall satisfaction with Internet service. With respect to dial-up and broadband, the overall satisfaction was 88 per cent and 96 per cent respectively.[93] In November 2003 Oftel reported that the top three Internet consumer issues were:

1. Complaint about a billing problem with broadband service (8 per cent of total complaints);
2. Complaint about no, or erratic connection to broadband service (7 per cent of total complaints), and
3. Complaint ignored by ISP (6 per cent of total complaints).[94]

[93] *Consumers' use of Internet, Oftel residential survey, Q14 August 2003*, Of tel, October 27, 2003, p. 26. Ofcom has taken over Oftel's duties.
[94] *Consumer complaints made to Oftel – the telcoms industry regulator*, Oftel, November 19, 2003.

Like Ofcom, the Australian Communications Authority (ACA) uses survey research to monitor satisfaction with Internet service. The Authority monitors overall satisfaction and satisfaction with Internet contract terms and conditions. In 2003 82 per cent of respondents reported being satisfied with their overall Internet service; 84 per cent of respondents said they were satisfied with Internet contract terms and conditions.[95]

ACA has also put in place *Guideline for Internet Service Providers: Consumer Choice Information*. According to ACA:

> "This guideline seeks to provide a framework for ISPs to provide information in a form that will allow consumers to compare information from ISPs about prices and factors related to the capability, quality and reliability of access."[96]

The guideline sets out a uniform and plain language approach to matters that are often buried in Canadian ISPs' service agreements – for example, termination fees and period of notice to terminate service. The guideline also contains quality of service information with respect to answering and responding to customer enquiries and with respect to the number of minutes that customers are unable to access the Internet. For example, BigPond, a major Australian ISP, has a standard for answering and responding to customer telephone enquiries of 80 per cent of calls in 120 seconds.

Australian Ombudsman Deals With Complaints

Australia's Telecommunications Industry Ombudsman (TIO) receives and reports complaints about ISPs. According to the TIO:

> "The TIO scheme provides an independent and informal forum for the resolution of complaints by consumers against telecommunications companies and ISPs. There is no charge to consumers to have a complaint investigated by the TIO.
>
> "All telecommunications companies and Internet service providers are required, under the Telecommunications Act, to be members of the TIO scheme. There is no fee to join the scheme, but companies are invoiced by the TIO each quarter according to the number of complaints made against them. Each company receives four free first level complaints each quarter. If a company does not receive more than four complaints against it for the quarter, it will not be charged a fee by the TIO."[97]

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[95] *Consumer Satisfaction Survey 2003, Summary Report,* Australian Communications Authority, p. 15.
[96] *Guideline for Internet Service Providers: Consumer Choice Information,* Australian Communications Authority, June 2002, p.2.
[97] "Beware of anti-TIO clauses in ISP contracts", Media Release, Telecommunications Industry Ombudsman, June 27, 2002.

In 2002 the TIO warned consumers "to steer clear of ISPs with contract clauses that discourage customers from taking complaints to the TIO. … [The Ombudsman] said that access to the TIO scheme was one of the few consumer safeguards in the largely unregulated Internet industry and called on ISPs to cease using the clause."[98]

TIO ANNUAL INTERNET SERVICE ISSUES[99]		
	2001/02 %	**2002/03 %**
Billing	37.7	38.5
Contracts	8.8	8.6
Credit control	1.4	2.7
Customer service	20.4	20.1
Disconnection	2.6	3.1
Faults	25.1	20.4
Privacy	0.6	0.7
Provision	3.3	6.0

Fine Levied In The U.S.

The U.S. Federal Communications Commission does not regulate the Internet or ISPs. State consumer protection offices and regulators may deal with complaints about ISPs. For example, in 2002 the California Public Utilities Commission (CPUC) approved a settlement agreement with respect to a complaint brought by the Utility Consumers' Action Network against Pacific Bell Telephone Company, Pacific Bell Internet Services and SBC Advanced Solutions Inc. Under the agreement, the companies acknowledged billing problems and reporting deficiencies, agreeing to pay a $27 million fine. The companies also agreed to a credit for the next two years of either $25 or one month of DSL service for customers who experience future billing DSL errors – double those amounts when the problem is not corrected on a timely basis. Other elements of the agreement included improved disconnection notices and upgraded problem resolution.[100]

With respect to the resolution of complaints, the CPUC cited problems that provide a template for ineffective complaint handling:

[98] "Beware of anti-TIO clauses in ISP contracts", Media Release, Telecommunications Industry Ombudsman, June 27, 2002.
[99] http://www.tio.com.au/statistics.htm
[100] News Release, "PUC Judge Approves Settlement Agreement with Pacific Bell and Subsidiaries over DSL Service", September 30, 2002, PUC: 90 Docket#: 1.02-01-024.

- Complaints were not resolved in a timely manner and/or required multiple calls and substantial investment of time to resolve, and
- Customers experienced unresponsive service such as
    - long waiting queues;
    - delays on hold;
    - transfers to other departments;
    - unreturned calls;
    - full voice mail boxes, and
    - inability to resolve a problem without having to wait on the phone.

A consumer wrote the Public Interest Advocacy Centre about service problems with a major Canadian ISP. The problems were similar to the problems cited by CPUC:

> "Called tech support a number of times over two days to fix a problem with my account and had to wait 15 to 20 minutes in the telephone queue each time. Several times my call was knocked off the queue after a long wait and I had to call back in and re-join the queue. Over 8 hours and through conversations with 10 tech support people, a problem with sending email was finally identified and resolved."

Consumer Protection In Service Agreements

Terms of service agreements exist between consumers and their ISPs. The agreements set out duties and responsibilities. They can be a source of consumer protection. The Public Interest Advocacy Centre examined Bell Sympatico's and Rogers' service agreements to evaluate the degree of consumer protection provided by the agreements.[101] The Centre compared the agreements to the major telephone companies' Terms of Service. The telephone companies' Terms of Service are approved and regulated by the CRTC. The ISPs' terms of service are not regulated.

[101] The service agreements were *Service Agreement – Bell Sympatico High Speed, High Speed Ultra and DSL Basic Internet Service*, February 25, 2004; *End User Agreement, Agreement for Rogers Cable Internet Access Services*, January 2004, and *Rogers Cable Internet Access Services, Acceptable Use Policy*, January 2004.

TERMS OF SERVICE COMPARISON[102]		
Telephone Companies	**Bell Sympatico**	**Rogers**
Service description in other CRTC regulations	Detailed service description	Detailed service description cross-referenced to other sources
Restrictions on ability to require deposits		
Refunds required for service interruptions or defects in transmission		
Restrictions on ability to collect unbilled and underbilled charges	Restrictions on ability to collect unbilled and underbilled charges	
Restrictions on companies' ability to suspend or terminate service	Bell Sympatico can suspend or restrict service at any time without notice; conditions for company termination specified	Rogers can at its sole discretion suspend or terminate service without notice or refund if terms breached by consumer; otherwise 30 days written notice to consumer
Bill payment obligations, including late payment charge	Bill payment obligations, including late payment charge	
Consumer rights set out with respect to disputed charges		
Consumer initiated termination of service policies	Consumer initiated termination of service policies	Consumer initiated termination of service policies
Quality of service standards set out in other CRTC regulations; CRTC sanctions possible for failure to meet standards	Service performance not guaranteed; no quality of service standards	Service performance not guaranteed; no quality of service standards
Conditions with respect to entering consumers' premises		Conditions with respect to entering consumers' premises
CRTC regulates service availability, quality and performance with the ability to sanction companies	Entire risk as to the availability, quality and performance of the service or any deliverable is with consumers	Entire risk as to the availability, quality and performance of the service is with consumers
Liability limitations described	Liability limitations described	Liability limitations described
CRTC approval required for changes to terms	Can modify terms, including rates, at any time without consumers' consent or authorization; consumers notified by e-mail or posting on Web site; consumers must agree to review terms periodically to be aware of modifications	May change, add or remove terms at any time without consumers' consent or authorization; consumers notified by e-mail or posting on Web site
Dispute resolution cross-referenced to another source; dispute resolution through a company manager; recourse to CRTC possible		Disputes referred to arbitrator; consumers must agree to waive right to participate in a class action and to opt out of class action against Rogers

[102] Not all the terms of service are compared due to differences in the nature of telephone and Internet services.

Consumer Views of Remedies

What Do Consumers Think About ISP Self-Regulation?

In light of the lack of information about consumers' ISP complaints and the lack of a dispute resolution mechanism, the Public Interest Advocacy Centre retained POLLARA Inc., a major public opinion and marketing research firm, to survey consumers. The survey of 1,350 adults was conducted in late March 2004.[103]

The first question asked by POLLARA for the Public Interest Advocacy Centre was:

> Currently business and other activity on the Internet is not regulated in the same fashion as telephone services, for example. Do you feel that government should develop and enforce consumer protection rules when it comes to the Internet, or would it be better not to develop and enforce such rules?
>
> Response:
> Government develop and enforce 62%
> Don't develop or enforce 27
> Don't know 12

If a respondent stated that the government should develop and enforce consumer protection rules, the following question was asked:

HOW IMPORTANT DO YOU FEEL EACH OF THE FOLLOWING WOULD BE IN DEVELOPING SUCH CONSUMER PROTECTION RULES?					
	VERY IMPORTANT %	SOMEWHAT IMPORTANT %	NOT VERY IMPORTANT %	NOT AT ALL IMPORTANT %	DON'T KNOW %
Prices charged for services	37	45	11	3	4
Service quality	62	31	3	2	3
Resolving disputes between businesses and consumers	56	33	5	1	5
Spam protection	62	22	4	1	11

Consumers do not appear to be satisfied with the ISPs' self-regulatory initiatives. Almost two-thirds of consumers think that the government should develop and enforce consumer protection rules. Eighty-nine per cent of these consumers feel

[103] The questions asked by POLLARA were included in a bi-weekly telephone omnibus survey *Consumer Perspectives*. The survey has an accuracy of ±2.7 per cent.

that rules for resolving disputes between businesses and consumers are very or somewhat important. More than half of consumers who want rules believe that dispute resolution rules are very important.

Consumers who believe that the government should develop consumer protection rules appear to be very concerned about ISPs' quality of service: 62 per cent said that it is very important to develop rules with respect to service quality while only 37 per cent felt it was very important to develop rules with respect to prices.

During the Public Interest Advocacy Centre's interviews with major ISPs about quality of service, we were advised to be cautious with respect to the quality of service results in our survey. We were told that many consumer complaints about service quality relate to consumers' computers and software – matters beyond the ISPs' control. The ISPs also pointed out that a great variance exists in consumers' computer and software knowledge. According to the companies, computer novices complain to ISPs about service problems that are, in fact, not related to their Internet service. The ISPs also pointed out that problems arise due to consumers' failure to use up-to-date anti-virus and firewall software. Since the companies do not publicly disclose an analysis of the complaints that they receive and their quality of service results, we cannot verify the companies' statements.

Conclusion and Recommendations

The Internet service market appears to be in transition from dial-up to high-speed access. In 2002, for the first time, total high-speed exceeded dial-up subscriptions. Two suppliers dominate the unregulated high-speed market: cable and telephone companies. Although wireless ISPs and ISPs that resell cable modem and DSL high-speed service exist, their current role is minor – about four per cent of the market.

In addition to a high-speed market dominated by two suppliers, Canada faces an Internet service landscape characterized by a significant digital divide. Low income Canadians have low use of the Internet, an important issue for governments hoping to transfer government services on-line. In addition, consumers appear to have little confidence in the security and privacy of sensitive personal information on the Internet. Consumers are also becoming more vulnerable to software security flaws, worms, trojans, viruses, and spyware.

Unsolicited e-mail messages or spam are clogging consumers' in-boxes. The spam assault has led to the widespread introduction of spam filters by businesses and ISPs which in turn has led to e-mail messages not reaching their intended recipients. A Canadian – and perhaps a global – solution to the spam problem appears to be years away.

Consumers cannot look to a regulator for consumer protection with respect to the Internet. Retail Internet access services were forborne from regulation over five years ago during an era when high-speed Internet access was virtually non-existent. Numerous competitors to the telephone and cable companies characterized the dial-up market when the CRTC forbore from regulating retail Internet services.

Reliable consumer complaint statistics about Internet service in Canada are not publicly available. Like complaint statistics, the self-regulatory process is behind closed doors. Self-regulation lies with the ISPs' customer service departments. The ISPs' service agreements set out some consumer rights but they are often silent on important consumer matters such as deposits and refunds for service disruptions.

At least two major ISPs' service agreements contain pre-dispute mandatory arbitration clauses, raising dangers for consumers. Mandatory arbitration clauses may result in higher costs for consumers, lack of procedural fairness, lack of transparency, exacerbate the existing contract imbalance between consumers and businesses and have minimal deterrent effect. The ISPs' pre-dispute mandatory arbitration clauses deny class actions to consumers – a very significant loss for consumers.

Consumers appear to want better consumer protection when it comes to Internet service. Survey research commissioned by the Public Interest Advocacy Centre found that 62 per cent of consumers want government to develop and enforce Internet consumer protection rules. The survey research revealed that service quality is more important than price amongst consumers who want consumer protection rules. The research also found that 89 per cent of consumers believe that rules for resolving disputes between ISPs and consumers are very or somewhat important.

ISPs are the gateways to the Internet. The Public Interest Advocacy Centre's research and analysis shows that more effective self-regulation is required by ISPs in a world that is being transformed by the Internet and in a world where there are essentially two high-speed gateways. More effective self-regulation includes the removal of pre-dispute mandatory arbitration clauses from service agreements.

Effective self-regulation is quasi-independent, transparent and accountable, features that understandably do not characterize customer service departments. Self-regulation does not detract from the essential role of customer service departments for consumers and for management. Self-regulation reinforces good

customer service with effective and timely dispute resolution. Effective self-regulation can be done on a company basis – for example, an ombudsman – or on an industry basis (or both). Several self-regulatory models exist; they are beyond the scope of this study.

If ISPs do not put in place effective self-regulation, public support for the development of consumer protection rules by government may be translated into government regulation by the CRTC or a similar agency.