

**Improving Consumer Protection in Cell Phone /  
Wireless Device Contracts: Public Consultation  
Paper (Manitoba, December 2010)**

**Comments of the Public Interest Advocacy Centre**



**January 17, 2011**

# **Comments of the Public Interest Advocacy Centre**

on

Improving Consumer Protection in Cell Phone / Wireless Device Contracts:  
Public Consultation Paper (Manitoba, December 2010)

## **About PIAC**

The Public Interest Advocacy Centre (PIAC) is a non-profit organization that provides legal and research services on behalf of consumer interests, and in particular, vulnerable consumer interests concerning the provision of important public services. PIAC has been deeply involved with regulatory law in telecommunications over a period of more than 20 years, largely before the Canadian Radio-television and Telecommunications Commission. PIAC also has been campaigned for reform of consumer protection laws at a federal and provincial level for many years.

These comments discuss the Consultation started by the Consumer Protection Office of the Manitoba Family Services and Consumer Affairs ministry in December 2010. This consultation commenced with the CPO's publication of "Improving Consumer Protection in Cell Phone / Wireless Device Contracts", which is part of Manitoba's larger "Let's Make a Better Deal" revamping of consumer protection in the Province of Manitoba.

## **Entering the minefield**

PIAC is highly supportive of Manitoba's review of consumer protection legislation in the province, its holistic approach and in particular its open engagement with all parties, and in particular citizens and consumers, in the development of policy. We note that Quebec has for some years been reforming its consumer protection law, in planned substantive tranches, and recently has tackled the problem of consumer discontent with telecommunications services, in particular wireless contracts. It is a positive development for Manitoba to try to chart a similar course.

That said, the consumer protection landscape in telecommunications is a minefield. Most of the concerns in trying to deal with consumer protection in relation to wireless contracts are jurisdictional. Quite simply, anything that is in

pith and substance “telecommunications” is wholly federal.<sup>1</sup> The problem, quite frankly, is where the line between “telecommunications” and “Property and Civil Rights in the Province” is to be drawn.

We do not wish to raise these “landmines” at the expense of consumer rights. PIAC is well-aware of a number of festering problems with cellphone contracts, whether for voice or wireless data services. Some of these include those identified in the consultation paper and some not, including: high early termination fees; unilateral contract changes (including price increases and service reductions); incomplete or incorrect billing; inability or unwillingness to remedy billing errors; excessive roaming fees (data and voice); mobile premium services complaints; high long-distance charges; inability to reach a consumer service representative in a timely manner; failure to escalate complaints; failure to mention the existence of the Commissioner for Complaints for Telecommunications Services; misleading advertising; misrepresentations at point of sale; lack of disclosure of contract fees and penalties, contract termination procedures and costs; poor deposit and disconnection policies; slow number portability, etc.

### **What Quebec Did**

Quebec’s Bill 60 was an amendment to an admirably consumer-oriented consumer protection act that is also buttressed by several general consumer-friendly aspects of Quebec’s Civil Code. Outside of the requirements for more disclosure, which, while helpful, rarely are used by consumers and in particular young cellphone-toting teens and young adults, Quebec’s major substantive innovation is an effective prohibition of early termination fees. Quebec simply did not believe industry claims that handsets that were “subsidized” by the cellphone providers required a penalty equivalent to the “value” (most likely retail, which price is not paid by a cellphone company wholesaling hundreds of thousands of handsets) of the phone, or more (if one accepts the rapidly declining value of cellphones over extremely short time periods). As a result, it set a maximum value of \$50 or less for this “inducement” should a consumer seek early termination of the contract. Quebec coupled this with a requirement for the contract to end at the end of its term. Finally, Quebec added protection in relation to extended warranties and replacement handsets.

---

<sup>1</sup> See *Alberta Government Telephones v. Canada (CRTC)*, [1989] 2 S.C.R. 225 and *Téléphone Guèvremont Inc. v. Quebec (Régie des télécommunications)*, [1994] 1 S.C.R. 878.

## **What Quebec did not do**

Quebec did not call this effort the “Cellphone Protection Act”.<sup>2</sup> It did not seek to regulate aspects of pure “telecommunications” such as roaming fees. In other words, Quebec played the constitutional game. Manitoba should as well.

Quebec’s legislation theoretically applies to any “contract involving sequential performance for a service provided at a distance”. While at present, the only obvious such service that PIAC can identify is telecommunications, is not to say that contracts that may be performed sequentially at a distance might not in future exist. The rest of Quebec’s concerns, with contractual disclosure and warranty and replacement of goods, are traditional areas of provincial jurisdiction.

Thus it is certainly arguable that Quebec’s approach is constitutional, being concerned largely with limiting overvalued inducements as an excuse for imposing early termination fees that PIAC believes should be held to be unenforceable penalties at common law, and related matters.

## **What Manitoba is trying to do**

It is PIAC’s belief that the Manitoba paper is discussing all consumer issues with wireless and thus has cast its net too wide. In our view, the prudent course is to mirror Quebec’s main substantive reforms, namely limits on early termination fees and to mandate disclosure.

To attempt to bulletproof such a law from constitutional challenge, the Province could simply mandate a limit on early termination fees for all contracts in Manitoba. PIAC is unclear on whether the province’s commitment to consumer protection reform extends this far. However, the more general the provision’s

---

<sup>2</sup> PIAC views the Ontario bill attempting to regulate early termination fees but also other aspects of wireless contracts as suspect constitutionally for overreaching, however, it is definitely NOT aided by being called the “Wireless Phone, Smart Phone and Data Services Transparency Act”. Such amounts to jurisdictional name-calling and provides absolutely no room for argument that the measures were intended solely to address provincial contractual issues.

application, the less likely a claim could be made that what was being regulated was telecommunications.

Regarding the questions posed in the “Next Steps” portion of the consultation paper, there are a number which mix disclosure with substantive consumer rights in “telecommunications”, that is, wireless. We take the very first: all-in pricing for wireless contracts. While PIAC has been a relentless proponent of all-in pricing in airline advertising<sup>3</sup> and also has studied and decried the practice of billing for phantom “extra charges”<sup>4</sup> we cannot but conclude that such regulation would, if directed at wireless providers, fall on the federal side of the jurisdictional divide. Were the province to, again, mandate all-in pricing for all service contracts in the province, there would be a much stronger argument to defend it.

The rest of the proposed questions suffer from the same flaw of mixing provincial contractual and federal concerns in the wireless field in a kind of constitutional soup. While consumer may not notice the constitutional niceties involved in the simple provision of a wireless connection, we can assure you the wireless companies do.

PIAC thus recommends a new consultation with a restated set of proposals that have a principled basis for their segregation into categories of provincial, federal and potentially shared jurisdiction.

To this end, we simply point out certain realities that may not occur to those seeking to protect consumers who do not cross swords with the telecommunications industry under the eye of the CRTC each day.

### **The CRTC won't help; at least, not openly**

The CRTC has forborne from all but the most tenuous of regulation of retail wireless services and appears to have little appetite to do so in the future. The CRTC's actions are highly constrained by the edicts of the “Policy Direction”,

---

<sup>3</sup> See [http://www.piac.ca/transport/make\\_airlines\\_advertise\\_the\\_real\\_price/](http://www.piac.ca/transport/make_airlines_advertise_the_real_price/)

<sup>4</sup> See PIAC, “The Practice of Extra Charges in the Canadian Marketplace”

(2009). Online:

[http://www.piac.ca/files/piac\\_report\\_extra\\_charges\\_canadian\\_marketplace.pdf](http://www.piac.ca/files/piac_report_extra_charges_canadian_marketplace.pdf)

issued in 2006 by the federal Cabinet to dissuade the CRTC's use of regulation where "market forces" could be relied upon. Short of market failure, and perhaps beyond, the CRTC will not overtly regulate most of the problem areas identified.

The CRTC may participate informally in consultations with provinces that enact laws that may be used in the wireless area. The CRTC also may be open to some cooperation, especially in the form of voluntary persuasion and consultation on billing matters either through the CCTS or the CRTC's own CISC committee structure. However, the CRTC will not overtly help with this process.

### **The CWTA won't help**

The Canadian Wireless Telecommunications Association's Code of Conduct is voluntary, and its only substantive consumer protection is the (voluntary) forbearance of members to enforce contract changes mid-contract that the company in its own opinion judges material. This is a wholly useless standard that rarely if ever results in a consumer reversal of an early termination charge, which the industry uniformly appears to judge as not a contract change, or not an "additional penalty". Other mid-term contractual changes rarely result in an opportunity for the customer to continue with the original contract or terminate it without "additional" penalty. Occasionally the CCTS may refer to this code but it is without practical effect. The CWTA's submission to your consultation makes clear that the CWTA believes in market forces far more strongly than its customers and that the CWTA's self-regulation is unlikely to create the kind of consumer protections that Manitobans deserve.

### **So, now what?**

As noted, PIAC recommends CPO reboot this process with a technical legal consultation paper that attempts to express a legal and policy basis for why there should be provincial or federal jurisdiction on the several issues identified in this round of consultations and that that be commented upon by industry experts, consumers and other stakeholders such as PIAC and the CRTC. The province also should work through the federal-provincial-territorial Consumer Measures Committee to add wireless to their agenda and demand a meeting on coordinating jurisdiction over wireless and telecommunications (and perhaps transportation) consumer protection. Manitoba should consult not only with other provinces but also with the CRTC and the CCTS.

While we applaud Manitoba's brave charge to consumer protection in this area we simply are cautioning the province to gird itself for what likely will be a long and arduous battle.

For more information, please contact:

John Lawford  
Counsel  
ph: (613) 562-4002 x 25  
[lawford@piac.ca](mailto:lawford@piac.ca)

Michael Janigan  
Executive Director, General Counsel  
ph: (613) 562-4002 x 26  
[mjanigan@piac.ca](mailto:mjanigan@piac.ca)

Public Interest Advocacy Centre  
1204-ONE Nicholas St  
Ottawa, ON K1N 7B7  
<http://www.piac.ca>