

**Public Interest Advocacy Centre (PIAC)
Submission to the
Government Consultation on
A Digital Economy Strategy for Canada**



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ABOUT PIAC

The Public Interest Advocacy Centre (PIAC) is a non-profit charity organization that provides legal and research services on behalf of consumers interests for the provision of important public services. PIAC strives to represent the interests of ordinary and vulnerable consumers in the marketplace concerning the rates, policies, rules and regulations associated with the delivery of these services with a view to ensuring principles of access and affordability and fair treatment for consumers. PIAC has developed a strong record of consumer advocacy since its inception in 1976 and is widely recognized as an important and influential voice for ordinary consumers in a variety of marketplace issues. PIAC seeks to ensure that the public interest is served, and not neglected, by decision makers in government and the private sector when decisions are made about consumer issues.

PIAC has expertise in the areas of telecommunications, representing consumers before the Canadian Radio-television and Telecommunications Commission (CRTC), energy, representing consumers before the Ontario Energy Board, and in general, financial services, transportation, copyright, privacy, the internet, electronic commerce and consumer protection.

INTRODUCTION

PIAC is grateful for the opportunity to comment on the important issues raised in the Consultation Document issued by the Government on Canada on the digital economy. Our comments are based on our work in previous consumer consultations on telecommunications matters before the Canadian Radio-television Telecommunications Commission and previous legal and policy work on electronic commerce, electronic payments and privacy issues.¹

Canada lacks a digital strategy, in comparison to other countries that have spent considerable time contemplating and formulating their digital strategy. Over twenty countries in the world have comprehensive digital strategies, such as the United States' *National Broadband Plan*,² the European Union's *i2010* and *Europe 2020: A European Strategy for Smart, Sustainable and Inclusive Growth*,³ the United Kingdom's *Digital Britain*⁴ and France's *francenumerique 2012*.⁵

Most recently, the Standing Senate Committee on Transport and Communications published a report entitled "Plan for a Digital Canada" in June 2010. The Committee initially focused their study on issues with the wireless sector in Canada, but then broadened their study to the digital society after noting that several other countries had comprehensive digital plans, which Canada lacked, and that wireless issues cannot be easily separated from other telecommunications services and broader digital issues. Indeed, the Committee's first recommendation was that Canada should present a strategy for an inclusive digital society.⁶

The scope of PIAC's submission here is to address the questions asked in the Digital Economy Consultation Paper.⁷ The intent of our submission is to focus on legislative and regulatory elements that are lacking to provide sufficient consumer protection in the digital economy. The structure of the industry will determine how our future evolves and the progress of Canada's digital economy. Structural problems with competition and

¹ PIAC participated in the roundtable convened by Andrew Clement and Karen Louise Smith supported by the Faculty of Information, Identity, Privacy and Security Institute (IPSI) and Knowledge Media Design Institute (KMDI) at the University of Toronto and endorses the consensus submission. See submission online: http://ipsi2010.pbworks.com/f/2010July9_DigEconSubmissionFinal.pdf. However, PIAC wishes to provide our more detailed view on the issues outlined in this submission.

² United States, Federal Communications Commission, "National Broadband Plan: Connecting America" (2010), online: <http://www.broadband.gov>.

³ European Commission, "Europe 2020: A Strategy for smart, sustainable and inclusive growth" (25-26 March 2010), online: http://ec.europa.eu/eu2020/index_en.html.

⁴ Britain, Department for Business Innovation & Skills, "Digital Britain" (9 April 2010), online: <http://interactive.bis.gov.uk/digitalbritain/>.

⁵ France, "France numerique 2012 – Plan de developpement de l'economie numerique" (October 2008), online: <http://www.ladocumentationfrancaise.fr/rapports-public/084000664/index.shtml>.

⁶ Senate Standing Committee on Transport and Communications, "Plan for a Digital Canada" (June 2010), online: <http://www.planfordigitalcanada.ca> at Recommendation 1 on p. 12.

⁷ Minister of Industry, Minister of Human Resources and Skills Development and Minister of Canadian Heritage and Official Languages, "Improving Canada's Digital Advantage: Strategies for Sustainable Prosperity, Consultation Paper on a Digital Economy Strategy for Canada" (10 May 2010).

consumer protection will only continue in the framework unless proper and balanced legislation and regulations are put in place to promote competition and protect consumers who use digital technologies.

PIAC notes that the Consultation Paper's questions are limited to the shaping of a digital economy based on a framework that assumes that a competitive, market-driven model will best address ICTs and digital technologies in Canada's future. While these are important issues, we are concerned that this limited scope may not achieve what is critically needed at this time: a holistic digital strategy for society as a whole. Thus, we hope that Canada will pursue a comprehensive digital strategy, one aspect of which is a strong digital economy.

CAPACITY TO INNOVATE USING DIGITAL TECHNOLOGIES

Since the introduction of the world wide web, rapid changes introducing digital technologies only seem to be picking up speed and changing consumer expectations. With the introduction of smartphones and their increasing popularity, we are moving towards the societal expectation of ubiquitous internet access from all electronic devices. This rapid shift heightens privacy and security concerns as consumers use these devices to participate in electronic commerce and constant social connectivity through social networking services. Governments have struggled to keep pace as innovative digital technologies and new business models evolve quickly and antiquated laws that were designed to protect tangible property and apply to analog networks and legacy systems no longer seem applicable or seemingly produce unreasonable results.

Protecting the Online Marketplace

Electronic Commerce

Canadian consumers need to have confidence in the online marketplace to take advantage of its full commercial benefits. Reliability, security and guarantees for privacy protection are all important considerations for full consumer trust. In a 2008 survey designed by PIAC, a majority of consumers felt that there was a risk involved when banking online and purchasing goods online. Generally, consumers found purchasing online goods to be slightly more risky than online banking.⁸

Consumers need to be given assurances regarding their security when participating in electronic commerce. Despite the widespread use of electronic authentication systems in consumer transactions online, a number of studies have shown that consumers are still resistant to authentication services and frustrated with the lack of security provided by online bank services and online retailers.⁹ In particular, consumers are concerned about hackers, identity theft, monetary fraud and the loss of privacy.

Greater certainty is needed regarding which party bears the liability for losses in the event of unauthorized transactions and fraud. Consumers need to know that they will not be fully responsible for losses where their security has been compromised through no fault of their own. PIAC has previously suggested that the provider of the payment system and financial services should be reliable for such losses, as banks and retailers are in the best position to ensure that their authentication systems are secure and protect consumer privacy.¹⁰ Financial institutions and businesses should not be able to

⁸ PIAC, "Are You Sure You Want To Continue? Authentication at the Crossroads" (September 2008), online:

http://www.piac.ca/financial/are_you_sure_you_want_to_continue_consumer_authentication_at_the_crossroads.

⁹ PIAC, "Are You Sure You Want to Continue", *ibid.* at pp. 13-14. 62% of respondents felt there was a risk involved in online banking and 77% felt there was a risk involved in purchasing goods online.

¹⁰ PIAC, "Are You Sure You Want To Continue", *ibid.* at pp. 5 and 39. 87% of respondents believed that banks and retailers should bear the loss if their account was accessed without their permission.

contract out of all liability for losses stemming from inadequate security through standard form contracts.

Some commentators have suggested that digital identity management through a government-issued national digital identification for consumers would be appropriate to foster a well-functioning e-commerce marketplace and increase consumer participation in the digital economy.¹¹ Such a centralized digital identification raises many concerns regarding individual privacy and security from fraud and counterfeit. As well, such an identifier would need to be protected from function creep to preserve consumer trust, as has been the experience with Social Insurance Numbers.¹² Furthermore, consumers should never be required to use a biometric to authenticate, as consumers should be able to choose an authentication process that does not require a biometric authenticator.¹³

Electronic Payments

In 2009, the Minister of Finance presented a *Draft Code of Conduct for the Credit and Debit Card Industry of Canada*, addressing issues concerning merchant fees and purporting to provide merchants with tools to redress market practices. PIAC commented on the *Draft Code*,¹⁴ suggesting that the implementation of some of the provisions would significantly increase consumer search and transaction costs and clash with consumer rights as legislatively implemented, without providing consumers with any compensatory benefit. It would also be unlikely to provide effective remedies to the problems encountered by merchants. While the Code attempted to solve these issues by transparency requirements and a bar on co-badging of debit and credit cards, we view the Code's effectiveness as at best temporary. PIAC also has some reservations about the ability of the Financial Consumer Agency of Canada (FCAC) to police the Code and would support a legislative intervention by the Minister to codify electronic payment systems generally.

Interchange fees are most likely too high and increasing competition in the payments market will probably push them upwards. Mandatory payment routing by retailers and discounting raise significant consumer protection issues. Uncoupling of debit and credit

¹¹ In the fall of 2003, the Department of Citizenship and Immigration began an open discussion on national identification cards, sponsoring a forum on ID card policy in October 2003. The document security and data management industry has been advocating for a mandatory national ID card in the past. At the Digital Economy Strategy Roundtable on Protecting the Online Marketplace hosted by the Electronic Commerce Branch on June 28, 2010, identity management was discussed and the idea of a government-issued national identification card to participate in electronic commerce was raised.

¹² PIAC, "National Identity Cards, Biometrics and the Consumer: Displacing the Person from the Person" (February 2006), online:

http://www.piac.ca/privacy/piac_report_national_identity_cards_biometrics_and_the_consumer_displacing_the_personal_from_the_person.

¹³ PIAC, "National Identity Cards, Biometrics and the Consumer: Displacing the Personal from the Person", *ibid*.

¹⁴ PIAC, *A ghost in the machine? The consumer perspective on the draft code of conduct for the credit and debit card industry* (January 2010), online:

http://www.piac.ca/financial/consumers_left_out_in_the_code.

acceptance is unlikely to be effective. Measures aimed at premium cards and co-badging are weak.

PIAC suggested that measures should be aimed at improving market transparency. The most effective measures aimed at interchange fees have taken the form of regulatory caps. Measures such as discounting or dishonouring cards have not been very effective and are not usually contemplated by government authorities. PIAC suggested that the federal government establish a process to bring stakeholders together and to elaborate a coherent regulatory framework for payments in Canada.

The Canadian Consumer Initiative (CCI), which includes PIAC, previously advocated for a strong electronic payments framework. A legislative solution would be the best way to establish an effective, efficient and fair payment system for all Canadians. A voluntary code for electronic payments in Canada would likely be a long and cumbersome process which might not lead to a consensus of the numerous and diverse stakeholders which should all be involved. The Initiative outlined seven principles for an electronic payment framework, which we reiterate here:

1. universality;
2. neutrality;
3. security;
4. accountability;
5. transparency;
6. liberty; and
7. enforceability.¹⁵

In March 2010, Finance Minister Jim Flaherty announced that a Task Force would be appointed to conduct a comprehensive review of the Canadian payments system, to be launched in the spring of 2010. PIAC looks forward to contributing more detailed comments in that venue. However, PIAC notes that the Task Force has no obvious representation from the consumer protection field and trusts that the Task Force will implement a mechanism to fund public interest intervention.

Mobile Commerce

M-commerce represents the extension of e-commerce into the mobile environment. Wireless telephones are the fastest growing consumer product in history. Mobile phones are not only used to participate in internet commercial transactions but also for point of sale mobile payments. The global growth of electronic commercial transactions executed by means of mobile phones and communication devices, personal digital assistants (PDAs) and handheld computers constitutes the latest and most important development in the area of e-commerce. While e-commerce has been dependent on the operation of costly personal computer equipment, current advances in disruptive mobile technologies and the ongoing migration to packet-based IP technologies have

¹⁵ Canadian Consumer Initiative, "Regulating electronic payments: taking the right direction, but not the best path", Comments to Finance Canada (21 July 2006).

propelled the adoption of mobile phones and other devices capable of accessing web content anytime, anywhere, bringing e-commerce into the mobile world.

PIAC has found that the two main factors that have chronically impaired the growth of m-commerce are associated to the main factors why Canadian mobile telephony penetration rates have been stagnating for years: high and internationally uncompetitive pricing and a persistent lack of consumer confidence in the industry and its commercial practices.¹⁶

Addressing the last factor of consumer confidence first, a 2007 survey commissioned by PIAC found that Canadian mobile users are apprehensive about the implications of storing their personal financial data in chips inserted in their handsets as well as about their handsets being used as m-payment mechanisms. Respondents suggested that a combination of industry codes and government rules would be the best mechanisms to protect consumers.¹⁷ The greater consumer participation and engagement has not been accompanied with the corresponding greater degree of legal protection for consumers' privacy, safety and warranties to their online transactions. Consumers are also concerned with both privacy and convenience, but privacy concerns cannot be interpreted as a trade-off for convenience.

The Trans Atlantic Consumer Dialogue (TACD) published the "Resolution on M-commerce" in 2005, expressing concern for the increase in consumer complaints about m-commerce for fraudulent activities as well as for unfair business practices.¹⁸ Among concerns about spam sent to mobile phones and privacy such as tracking purchases and the location of device user, a major concern was with respect to inadequate disclosures in advertisements about the products and services offered, the cost, and the terms and conditions. Often the details of the transaction, such as recurring monthly charges, are presented in fine print or are not made clear or easily readable for the consumer. To further complicate matters, the consumer cannot print or save a copy of the displayed details or terms, making it difficult to file a complaint or pursue a dispute should a problem arise. There may also be a disparity of dispute rights depending on how payment is made. Dispute rights for unauthorized transactions and incorrect charges may differ according to whether the charges were placed on a telephone bill, billed to a credit card, deducted from an "e-wallet" or debited from a consumer's bank account and may differ from country to country.¹⁹

The pricing factor is a huge concern for consumers. Canadian mobile pricing is comparatively high to the rest of the world. As well, the fact that the mobile telecommunications industry generates the vast majority of consumers'

¹⁶ PIAC, "Mobile Consumers: Making It Work for Canadians" (April 2007), online:

http://www.piac.ca/telecom/mobile_commerce_making_it_work_for_canadians_1/ at p. 5.

¹⁷ In a survey commissioned by PIAC (discussed in PIAC, "Mobile Consumers: Making It Work for Canadians", *ibid.*, 52% of respondents said that a combination of industry codes and government rules would be the best mechanism, followed by 17% who think that government rules are the best mechanism.

¹⁸ Trans Atlantic Consumer Dialogue (TACD), *Resolution on Mobile Commerce*, August 2005, online: <http://www.tacd.org/docs/?id=283>.

¹⁹ PIAC, "Mobile Consumers", *supra* note 16 at p. 47.

telecommunications complaints is an indication of a major failure in the information exchange mechanisms between customers and carriers, undermining their relationship and the overall credibility of the industry.²⁰ The affordability of wireless service is further discussed later in this submission, but it is important to note that this high pricing contributes to a stagnating consumer participation in the mobile commerce market in Canada.

Canada must consider the mobile economy as more than a matter confined exclusively to the profitability of a few dominant operators. There exist pricing barriers imposed through price discrimination (bundling) to consumers and enterprises alike by mobile and backbone operators.

Copyright Issues

Copyright laws must appropriately balance the interests of creators with the interests of the public.²¹ Copyright grants creators exclusive rights in their works as a reward for creativity that also serves as an incentive for the creation of new works. These rights are not absolute, but limited in nature, scope and time. These limits are essential to copyright's greater design, for it is at the limits of copyright owners' rights that important consumer interests come into play.

From a consumer's perspective, copyright's current balance is far from perfect. In fact, many ordinary customer dealings with copyrighted content, such as copying purchased music or a DVD movie onto a portable device or using the digital video recorders sold by cable companies, technically infringe copyright. The law is simply out of step with reality and must be updated to reflect consumers' actual use and enjoyment of digital technologies.

In a Consumer White Paper published in 2008, consumer groups including PIAC recommended some ways to bring copyright law into step with the ways consumers use copyrighted materials:

1. **Clarify the legality of time, space, and format shifting.** Copyright laws that outlaw these practices threaten consumers and are out of step with today's marketplace and with reasonable consumer practices.
2. **Fix fair dealing.** Expand fair dealing rights to include other uses of content like parody, digital sampling and other transformative uses. Subsume the requirement to provide the source and author when a work is used for purposes of criticism, review, or news summary into the general fairness analysis.
3. **Legalize back-ups.** Protect consumers' right to protect their investments by making back-up copies of legal, purchased

²⁰ This issue is discussed in greater detail below under "Building a World-Class Digital Infrastructure".

²¹ *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 204 SCC 13.

content.

4. **Protect the public domain.** Reduce copyright terms, or keep them to the minimum needed to meet Canada's international obligations.

5. **Rationalize statutory damages.** Require plaintiffs to prove damages against consumers, public institutions, museums, libraries, archives, schools, colleges and universities. Restrict the application of statutory damages to cases of commercial infringement, where they are warranted and actually serve the public interest.

6. **Abolish crown copyright.** The public should enjoy free and unrestricted access to works produced with public funds.

7. **Consumer commissioned photographs.** Copyright ownership of commissioned photographs should stay in consumers' hands. Doing otherwise frustrates consumers' legitimate expectations.

8. **Protect copyright and consumers against unfair terms.** Restrict rights holders' ability to undermine copyright's public policy objectives through the use of contractual terms that limit consumers' rights, including the ability to undertake security, interoperability and reverse engineering research, to make reasonable use of content (time-shifting, space-shifting), to make private copies for personal use, and to re-sell content.

9. **Preserve consumers' digital rights.** The *Copyright Act* affords rights-holders only limited rights. It has never been an infringement of copyright law for a consumer to simply read a book, or to listen to music in the privacy of one's own home. By the same token, ephemeral electronic copies, or "RAM copies", should be treated the same way.²²

The amendments proposed in Bill C-32 in the last session of Parliament provide optimism for many of these updates to consumer fair dealing rights, such as backing up content, time and format shifting as well as parody, satire and "remixing" for non-commercial user generated content.²³ However, the same Bill introduces anti-circumvention laws that threaten Canadian consumers' ability to use the content that they have legally acquired in accordance with their fair dealing rights. Consumers

²² Joint Consumer Paper by Canadian Internet Policy and Public Interest Clinic (CIPPIC), PIAC, Option consommateurs, Online Rights Canada, "Canadian Copyright Law: A Consumer White Paper" (June 2008), online: http://www.piac.ca/copyright/canadian_copyright_law_a_consumer_white_paper/.

²³ Bill C-32, *An Act to amend the Copyright Act (Copyright Modernization Act)*, 3rd Sess., 40th Parl., 2010 (First Reading in the House of Commons 2 June 2010).

cannot legally remove or circumvent technical protection measures (TPMs) even if the consumer's use is allowed by fair dealing rights.²⁴

Any proposed anti-circumvention law must be careful not to stifle consumers' ability to legitimately use the content they have paid for in ways that are allowable under their fair dealing rights and in line with consumers expectations, such as for back up copies and time and format shifting. As well, anti-circumvention laws must not chill freedom of expression, such as parody, satire or "remixing".

Some suggest that the business model of using TPMs to protect content has found limited uptake. This may be so in the sound recording industry in light of the rootkit blunder by Sony BMG, however the DVD, software and video game industry continue to aggressively and ubiquitously use digital locks and show no sign of dropping these locks. Canadian copyright law should not implement legislative provisions that incent the entertainment industry to protect their content with digital locks without a means for circumventing these locks for non-infringing uses.

PIAC looks forward to working with the government to advance a balanced copyright law that fairly compensates creators and allows consumers to use creative content in legitimate ways.

Protecting Consumers' Privacy

The *Personal Information Protection and Electronic Documents Act (PIPEDA)* is a world-recognized consumer privacy protection law because of its principles-based approach that remains adaptable to new technologies and business models.²⁵ Without question, the Office of the Privacy Commissioner of Canada has gained much respect around the world for her investigations into innovative new digital services such as Facebook. However, the strength of Canada's private-sector privacy law is somewhat muted by the lack enforcement powers and needs to be improved to better protect Canadian consumers' privacy.

Mandatory Data Breach Notification

A regime requiring organizations to report data breaches to the Privacy Commissioner and to affected consumers is long overdue in Canada. Many other jurisdictions have mandatory data breach notification regimes, which not only protect consumers by providing them with notice when their personal information is compromised so they can take proactive steps to protect their privacy. Strong mandatory data breach notification regimes also serve as incentives for organizations to strengthen their security mechanisms for customer personal information databases. As well, mandatory data breach notification regimes in other jurisdictions have resulted in organizations

²⁴ Canadian Consumer Initiative, Media Release: "Consumers' Gains in Copyright Bill can be Taken Away by Media Companies: La Loi sur le droit d'auteur" (4 June 2010), online: http://www.piac.ca/consumers/consumers_gain_in_copyright_bill_can_be_taken_away_by_media_companies_la_loi_sur_le_droit_d_auteur/

²⁵ 2000, c. 5. The fair information practices principles are enumerated in Schedule 1.

implementing better data retention practices, only preserving consumers' personal information for as long as is needed by the organization to fulfill its purpose.

Businesses are collecting more personal information than ever before. With advances in technology, storage of this information is no longer an issue and the possibilities with data analytics are endless. However, a poll conducted by the Privacy Commissioner of Canada in May 2010 suggested that businesses are not demonstrating increased concern about data breaches, despite the increase in severity and number of data breaches in recent years.²⁶

The recently tabled Bill C-29 introduces a long overdue mandatory data breach notification regime.²⁷ However, the proposed regime gives organizations too much discretion when deciding when to report and does not give the Privacy Commissioner the power to fine an organization for failing to report a breach. The Bill fails to provide consumers with an effective data breach notification regime.

A Canadian mandatory data breach notification regime must have reasonable and measurable standards.²⁸ Ideally, such a regime would require organizations to report all data breaches to an oversight authority such as the Office of the Privacy Commissioner. This would achieve the policy goals of transparency and deterrence and help produce aggregate statistics to understand and track the scope of the problem of data breaches in Canada, the number of affected consumers and sensitivity of compromised personal information. Finally, an effective mandatory data breach notification regime must be accompanied by powers to enforce reporting, such as the ability to impose fines or take other enforcement action when an organization fails to notify in accordance with the law.

Online Consumer Tracking

PIAC's paper, "A 'Do Not Track List' for Canada?", discusses various digital technologies that enable organizations to perform consumer tracking and detailed consumer profiling in order to target consumers with behavioural advertising online such as cookies, search advertising, deep packet inspection and tracking on social networking services.²⁹ PIAC also submitted comments regarding online tracking,

²⁶ Office of the Privacy Commissioner of Canada, "Poll: Canadian businesses unconcerned about privacy breach risk" (27 May 2010), online: http://www.priv.gc.ca/media/r-c/2010/nr-c_100527_e.cfm.

²⁷ Bill C-29, *An Act to amend the Personal Information Protection and Electronic Documents Act (Safeguarding Canadians' Personal Information Act)*, 3rd Sess., 40th Parl., 2010 (First Reading in the House of Commons 25 May 2010).

²⁸ PIAC previously appeared at a stakeholder consultation meeting held by Industry Canada in 2008 regarding a Proposed Model for Data Breach Notification. Please see PIAC, "Data Breach Notification is Carte Blanche for Business Data Spills" (25 April 2008), online: http://www.piac.ca/privacy/data_breach_notification_proposal_is_carte_blanche_for_business_data_spills/.

²⁹ PIAC, "A 'Do Not Track List' For Canada?" (November 2009), online: http://www.piac.ca/privacy/tracking_consumer_online_behavioural_targeted_advertising_and_a_do_not_track_list_in_canada. PIAC has also published a report on the use of radio frequency identification (RFID) technology to identify and track consumers via a radio frequency signal. See PIAC, "Radio Frequency Identification and Privacy: Shopping Into Surveillance" (February 2006), online: http://www.piac.ca/privacy/radio_frequency_identification_rfid_and_privacy_shopping_into_surveillance.

profiling and targeting to the Office of the Privacy Commissioner of Canada 2010 Consumer Privacy Consultations.³⁰

In a survey commissioned by PIAC in 2009, consumers were found to be uncomfortable with unfettered collection and use of their personal information. When asked specifically about their comfort level with online tracking for the purpose of targeted behavioural advertising, nearly 75% of respondents stated that they were not comfortable with tracking. Most consumers are uncomfortable with online tracking and targeted advertising by market researchers and data brokers.³¹

Few consumers fully understand the role and extent that data collection plays in providing behavioural targeted advertisements and consumer tracking. Industry practices are often conducted covertly with little or vague notice to consumers hidden in privacy policies or terms of use. As online behavioural targeted advertising and online tracking becomes the ubiquitous industry standard, consumers are at the mercy of online advertisers with few options to control how their personal information is collected, used, disclosed and retained. Greater transparency and consumer education are needed for tracking technologies and online behavioural targeted advertising practices. Consumers need more notice about when and how they are being targeted. At minimum, stronger consent mechanisms are required and PIAC recommends an explicit consent (or opt-in) requirement before tracking consumers and subjecting them to behavioural targeted advertising.

PIAC is especially concerned about consumer profiling as it becomes a tool that facilitates the practice of discrimination. With consumer profiling, consumers can be sorted by vendors into groups or as specifically as individuals. It would be in the vendor's best interests to create a pricing scheme tailored to individual customers, offering a basket of select services to a type of client at the exact price point that the vendor knows the customer will not refuse. The vendor could also avoid certain customers based on their purchase or online histories.³² Consumer profiling could place low-income and vulnerable consumers at risk, as their profiles may lead them to be neglected, avoided or preyed upon. Facts about an individual, such as prior bankruptcy, may disqualify vulnerable consumers from economic transactions.³³

³⁰ PIAC Submissions to Office of the Privacy Commissioner of Canada on Behavioural Targeting (March 2010), online: http://www.piac.ca/privacy/piac_comment_to_privacy_commissioner_of_canada_on_behavioural_targeting.

³¹ PIAC, "A 'Do Not Track List' for Canada?", *supra* note 29 at pp. 10-12. 50% of respondents indicated that they were not very familiar or not at all familiar with tracking devices and techniques online. 25% of respondents were not very comfortable and 49% of respondents were not at all comfortable with tracking-based advertising. Even more consumers (25% not very comfortable, 53% not at all comfortable) expressed discomfort with companies and organizations that share information about their behaviours about consumers with third parties for the purpose of targeted advertising.

³² Tal Z. Zarsky, "Mine Your Own Business!: Making the Case for the Implications of Data Mining of Personal Information in the Forum of Public Opinion" 5 Yale J.L. & Tech. 1 (2002-2003).

³³ The Office of Fair Trading in the United Kingdom conducted a market study into online behavioural advertising and how websites use behavioural data to set customized pricing tailored for individual customers. See OFT Press Release, "OFT publishes views on online targeted advertising and pricing"

Such profiling shifts the balance of power in business-to-consumer relationships. With consumer profiling, any semblance of equal footing between businesses and consumers is displaced as profiling allows consumers to be sorted based on social or economic criteria. Online consumer profiling is an efficient and effective system for monitoring consumer behaviour, making it possible for the vendor or service provider to make subtle distinctions of rank and preferences.³⁴

Data mining can produce dangerous social impacts and undermines consumer privacy. Moreover, data mining practices manipulate and threaten consumer autonomy. Online behavioural targeted advertising based on data mining practices will push individuals to make certain consumer decisions by narrowing the options they receive and by offering persuasive arguments at the right time to lower the resistance of the consumer. When the motives of the advertisements are not obvious and the system appears to know the consumers' thoughts and desires better and earlier than they know themselves, how will the consumer be aware of where these desires came from? Legal scholar Lawrence Lessig argues that it is possible that as consumer profiling, consumer surveillance and data analytics are widespread, certain norms and observations will be drawn regarding consumer behaviours which will then affect how the observed act.³⁵

Such foundational concerns with possible societal ill-effect of consumer profiling and discrimination should lead the government to carefully consider how to effectively regulate to protect consumers from privacy risks of current and future industry practices of online targeted behavioural advertising and consumer tracking.

Youth Privacy and Social Networking Sites

PIAC has studied youth privacy in great detail, with a qualitative study of immersive online games targeting children and children social networking sites.³⁶ PIAC also filed a

(25 May 2010), online: <http://www.oft.gov.uk/news-and-updates/press/2010/53-10>. Full study: "Online Targeting of Advertising and Prices: A market study" (May 2010), online: http://www.oft.gov.uk/shared_of/business_leaflets/659703/OFT1231.pdf. The OFT suggests that the failure to inform consumers about the practice of targeted pricing might result in enforcement action by the OFT.

³⁴ Lawrence Lessig, *Code and Other Laws of Cyberspace* (1999) Basic Books, New York, NY at p. 155. Lessig recounts how markets were previously based on hierarchical social orders, wherein information about an individual's social rank allowed systems of hierarchy to be imposed and persist as social mobility was difficult. As mobility increased and citizens could visit other markets, hierarchical systems were challenged as the fluidity of society made consumers' social rank difficult to track. Lessig argues that online consumer profiling brings us back to the past, where hierarchical social orders can now persist.

³⁵ Lessig, *ibid.* at p. 154.

³⁶ PIAC, "All In The Data Family: Children's Online Privacy" (November 2008), online: http://www.piac.ca/privacy/children_s_privacy_threatened_by_play_websites_and_social_networking. PIAC actively contributed to the Working Group of Canadian Privacy Commissioners and Child and Youth Advocates, which published a paper entitled "There Ought To Be A Law: Protecting Children's Online Privacy in the 21st Century", a discussion paper for Canadians (November 2009), online: <http://www.gnb.ca/0073/PDF/Children'sOnlinePrivacy-e.pdf>.

privacy complaint with the Privacy Commissioner of Canada against Canadian teen social networking site Nexopia in January 2010 and we are currently awaiting findings.³⁷

Our studies suggest that children and minors have special developmental considerations that affect their ability to make decisions about their privacy. Children's websites overwhelmingly expose children's personal information without their informed consent or that of a parent or guardian under the guise of joining or enjoying websites that are designed to be online playgrounds. Children and teenagers simply lack the ability to appreciate the long-term consequences of the collection, use and disclosure of their personal information.³⁸ Immersive advertising and children and teen social networking sites are increasingly prevalent and thrive on the collection and sharing of personal information. PIAC continues to advocate for a three-part standard for the collection, use and disclosure of the personal information of minors:

- For children under the age of 13, there should be a general prohibition on the collection, use and disclosure of all personal information.
- For young teens aged 13-15, organizations should be permitted to collect and use personal information, with the consent of the teen and the explicit consent of the parent for the benefit of the child and solely in relation to the operation of the service or website. The organization should not be permitted to further disclose their personal information.
- For older teens aged 16 to legal majority, organizations should be permitted to collect and use personal information with the consent of the teen. Organizations should be permitted to disclose the personal information only with the opt-in consent of the teen and explicit consent of a parent.³⁹

Once children reach the age of majority, organizations that have collected and used personal information should no longer be permitted to retain the information gathered during the child's "legal minority" and should be required to remove the information immediately unless the newly adult person gives his or her explicit consent to the continued collection, use and possible future disclosure of their personal information gathered during their minority.

PIAC proposes other more specific rules for social networking sites, given that these sites attract teenagers and collect an immense amount of personal information. Teen

³⁷ PIAC Complaint to the Office of the Privacy Commissioner against Nexopia, filed January 2010, online: http://www.piac.ca/privacy/piac_files_privacy_complaint_agains_nexopia.

³⁸ In PIAC's research for "All in the Data Family", *supra* note 36, PIAC found that most children found it necessary to limit providing their private information online to other individuals, but these same participants did not perceive there to be many potential risks associated with providing personal information in public online spaces or to website administrators or corporations they consider to be safe, such as Facebook, Webkinz and YouTube. Children and teenagers appear to see the online world as an extension of the offline world, rather than a separate space with different rules.

³⁹ PIAC, "All in the Data Family", *ibid.* at pp. 4-5 and 69-72.

users would benefit from the strictest privacy settings available on a website by default. Default privacy settings on social networking sites are often set to the most open, or least privacy-protective settings. The social networking site would be prohibited from allowing lookup services (even to members within a site) that were able to return lists of children. Third, children would be allowed to sign up for social networks with a pseudonym.⁴⁰

Cloud Computing Services and Issues of Jurisdiction

With more services moving into the cloud, issues of jurisdiction are highlighted and exacerbated. PIAC recently submitted comments to the Privacy Commissioner of Canada's consultation on cloud computing issues.⁴¹

The jurisdictional and outsourcing aspects of cloud computing pose the greatest risks for consumers. A company processing its customers' personal information on servers in Canada does not run into jurisdictional or outsourcing companies.⁴² Once the company processes the information outside of Canada or outsources the processing of data to third parties, the protection of customer's privacy may become frustrated. For the most part, consumers are unaware that their personal information may be processed on servers in different countries with different state laws applicable. All companies that process their Canadian customers' personal information on servers outside of Canada should at the very least inform their customers which jurisdictions their data may be processed in and offer an opportunity to opt-out, consistent with the principles of notice and consent.

Security concerns are exacerbated given the amount of personal information stored in the cloud, further strengthening the case for an effective mandatory data breach notification regime. The wealth of data in the cloud located on one server or a network of servers may be seen to be more valuable to potential hackers or intruders.

Lawful Access

The government has attempted in the past to put forward various proposals for greater lawful access to private communications in light of advances in digital technologies and communications infrastructure. Starting with the government public consultations in 2002 on lawful access,⁴³ followed by a private government consultation with selected stakeholders in 2005, the first legislated attempt for lawful access was in 2005 with the

⁴⁰ PIAC, "All in the Data Family", *ibid.* at p. 6 and 75. The recommendation for pseudonyms comes from the International Working Group on Data Protection in Telecommunications, "Report and Guidance on Privacy in Social Network Services – Rome Memorandum" (2008), online: http://www.datenschutz-berlin.de/attachments/461/WP_social_network_services.pdf at p. 6.

⁴¹ PIAC Submissions to Office of the Privacy Commissioner of Canada on Cloud Computing (April 2010), online: http://www.piac.ca/privacy/piac_comments_to_privacy_commissioner_of_canada_cloud_computing.

⁴² "Processing" is taken to convey storage as well, so as to encompass the collection, use and disclosure of data.

⁴³ Department of Justice, Industry Canada and the Solicitor General of Canada, *Lawful Access Consultation Document* (25 August 2005).

Modernization of Investigative Techniques Act, which died on the Order Paper.⁴⁴ In 2007, the government consulted with the public regarding telecommunications service providers sharing their customers' name and address information with law enforcement agencies without a warrant in order to assist with law enforcement investigations.⁴⁵ In 2009, the government introduced two pieces of legislation for lawful access: *Investigative Powers for the 21st Century Act*⁴⁶ and *Technical Assistance for Law Enforcement in the 21st Century Act*.⁴⁷ Both Bills died on the Order Paper.

New technologies may necessitate updated legislation, however, the burden falls on the government to prove that an update to the legislation would not result in an expansion of law enforcement powers, thereby stripping Canadians of civil liberties protection in the face of the state. In PIAC's view, the government proposals for greater lawful access to private communications have not been demonstrably justified. In particular:

- it is not clear that greater access by law enforcement to electronic communications will in fact, or is even likely to, increase the security of Canadians;
- the privacy intrusions that would result from these proposals are clearly significant, while the security benefit to be derived therefrom is unclear;
- it has not been demonstrated that no other, less privacy-intrusive measure (e.g. focused on technological and/or administrative impediments) would suffice to achieve the same purpose of enhanced security.⁴⁸

These lawful access proposals go much further than maintaining existing lawful access capabilities. Instead, these proposals significantly increase the ability of law enforcement and national security agencies to intercept, search and seize electronic communications of individuals and personal information about individuals in electronic

⁴⁴ Bill C-74, *An Act regulating telecommunications facilities to facilitate the lawful interception of information transmitted by means of those facilities and respecting the provision of telecommunications subscriber information (Modernization of Investigative Techniques Act)*, 1st Sess., 38th Parl., 2005 (First Reading in the House of Commons 15 November 2005, died on the Order Paper).

⁴⁵ Public Safety Canada, "Customer Name and Address Information Consultation" launched 14 September 2007. See PIAC's submission to the Customer Name and Address Consultation (18 October 2007), online:

http://www.piac.ca/privacy/piac_comments_on_customer_name_and_address_information_consultation.

⁴⁶ Bill C-46, *An Act to amend the Criminal Code, the Competition Act and the Mutual Legal Assistance in Criminal Matters Act (Investigative Powers for the 21st Century Act)*, 2nd Sess., 40th Parl., 2009 (Second Reading in the House of Commons and referred to Committee 27 October 2009, died on the Order Paper).

⁴⁷ Bill C-47, *An Act regulating telecommunications facilities to support investigations (Technical Assistance for Law Enforcement in the 21st Century Act)*, 2nd Sess., 40th Parl., 2009 (Second Reading in the House of Commons and referred to Committee 29 October 2009, died on the Order Paper).

⁴⁸ PIAC, "Comments on the Federal Government's 'Lawful Access' Consultation Document" (16 December 2002), online: http://www.piac.ca/privacy/fed_gov_cybercrime_and_%E2_lawful_access%E2_proposals at p. 4.

form. Such efforts substantially weaken well-established safeguards and civil liberties guaranteed in the *Charter of Rights and Freedoms* and in Canadian jurisprudence.⁴⁹

The technologies that law enforcement agencies complain are hindering their ability to investigate criminal activities have also provided the basis for an unprecedented erosion of individual privacy. Individual privacy is increasingly under assault by virtue of the vastly easier access to vastly greater quantities of personal information available electronically. Lawful access proposals must protect Canadians' privacy and personal information in the electronic environment. If anything, privacy protections for electronic communication should be stronger than for non-electronic communications, given the unprecedented opportunities that electronic technologies offer for surveillance and intrusion.⁵⁰

Any lawful access regime must be accompanied by strong oversight mechanisms that ensure public accountability, transparency and scrutiny. This oversight should require routine reporting on measures undertaken in the name of law enforcement and national security and an accounting of the efficacy of these measures. Such reporting would enhance public confidence in the government and its agents exercising their rights to intercept and collect personal data. Strong penalties must be in place for improper use or disclosure of personal data collected via lawful access, as well as for improper attempts to access personal information.

One particular concern is the government's attempt to make telecommunications service providers (wireline, wireless and internet) effectively agents of the state by implementing technical requirements on their infrastructure to ensure intercept capabilities and requiring TSPs to cooperate with government authorities. It is possible that the proposed requirement for intercept capability will have an adverse effect on future innovation in the telecommunications service industry. As well, the cost of constructing the surveillance infrastructure may unnecessarily burden the industry and these costs will likely be passed on to the telecommunications customer.

All interception and search and seizure of electronic communications must require judicial approval, must identify a specific target, identify specific information to be seized or intercepted and must be accompanied with a specific rationale and justification for the seizure or interception. Any orders issued should be time-limited.

PIAC does not support the creation of production orders in the absence of clear evidence showing how existing warrant powers are insufficient. In the event that production orders are created, they must be subject to the same procedural safeguards that currently apply to warrants. To apply a lower standard would be to go beyond the objective of maintaining existing lawful access capabilities in the electronic environment. Measures should be put in place to prevent production orders from being used as fishing investigations by law enforcement agencies.

⁴⁹ *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* (Schedule B of the *Canada Act, 1982* (UK)). In particular, s. 8 of the Charter protects Canadians from unreasonable search and seizure.

⁵⁰ PIAC, Comments on Lawful Access, *supra* note 48 at p. 7.

Canadians should not be subject to greater monitoring or scrutiny just because they choose to avail themselves of new technologies and convenience. Criminal law principles, including standards for lawful access, should be technology-neutral.

Enforcement of Privacy Laws

Enforcement of privacy laws in a global world is an increasingly difficult task. With the emergence of cross-border services such as cloud computing and new business models like social networking services and online behavioural targeted advertising, applying Canadian privacy law to protect Canadian consumers' personal information is increasingly difficult. The Office of the Privacy Commissioner of Canada clearly has the jurisdiction to investigate complaints with respect to Canadians' personal information where PIPEDA is not respected abroad. However, enforcement of the Office's findings has proven more challenging.

The time has come to include strong enforcement powers in *PIPEDA* to compel organizations to comply with the findings of the Privacy Commissioner's investigations, such as the ability to impose financial penalties. PIAC strongly supports order-making powers for the Office of the Privacy Commissioner.⁵¹ Such order-making powers would enable faster responses to privacy risks emerging from innovation in the digital technology sphere, providing certainty to innovators and businesses and avoiding enforcement delay and consequences for consumers' personal information that is placed at risk while the case is examined *de novo* by the Federal Court of Canada.

Certainly multi-jurisdiction cooperation for privacy law enforcement should be encouraged. However, we must be careful not to dilute the privacy protections guaranteed to Canadian consumers within PIPEDA if international enforcement efforts are harmonized.

Cyber Security in Canada

Increasing consumer awareness of cyber security issues is only part of a comprehensive solution. Without question, consumer education on cyber security and cyber fraud will help prevent consumer susceptibility to malicious attacks. However, cyber fraudsters are becoming increasingly organized and blending behavioural knowledge with technologically sophisticated attempts to target individual consumers.

⁵¹ PIAC criticized the efficacy of *PIPEDA* for consumer privacy in a report, "Consumer Privacy Under *PIPEDA*: How Are We Doing?" (November 2004), online: http://www.piac.ca/privacy/report_consumer_privacy_under_pipeda_how_are_we_doing. PIAC appeared before the House of Commons Standing Committee on Access to Information, Privacy and Ethics on the *Personal Information Protection and Electronic Documents Act (PIPEDA)* on 6 December 2006 (Meeting 22 of the ETHI Committee, 1st Sess., 39th Parl., discussing Statutory Review of *PIPEDA*). See also PIAC Submission to Industry Canada considering the House of Commons Standing Committee on Access to Information, Privacy and Ethics' Report on the 2006 Review of the Personal Information Protection and Electronic Documents Act (*PIPEDA*), (15 January 2008), online: http://www.piac.ca/privacy/piac_criticizes_industry_canada_s_privacy_comments.

Greater consumer vigilance cannot be the entire solution. The passage of an anti-spam and anti-spyware law will certainly help protect Canadian consumers and the Canadian electronic commerce economy.

Anti-Spam and Anti-Spyware Laws

Unsolicited commercial email continues to be a problem that plagues consumers and businesses and a law to deter and punish spam is long overdue. Spam and malware such as spyware undermine consumer trust in electronic communications and electronic commerce. These online threats also cost businesses and consumers time and money in their attempts to clean up their computers and recover lost data.

PIAC is very supportive of the recently tabled Bill C-28 and encourages Parliament to move swiftly on this issue.⁵² For anti-spam law to be effective, it is most important to resist broadening any exemptions from the application of anti-spam law or the consumer consent requirement. The cornerstone of an effective Canadian anti-spam legislation will be explicit consumer consent, wherein a person's verifiable consent is required to receive commercial e-mail. Any commercial e-mail that fails to obtain this threshold consent must be considered spam.

As well, enforcement bodies must be given resources to properly perform their investigative and enforcement role. Cross-border cooperation is especially important as spam and spyware threats are often organized across multiple jurisdictions and occur on an international scale.

PIAC has previously advocated for a private right of action with statutory damages for unwanted installations of spyware.⁵³ Other jurisdictions, such as in the United States, grant consumers the remedy of private right of action. Such a private right of action would provide a mechanism for consumer compensation and would only be used in egregious cases, where a consumer has suffered actual loss or damage. Courts are best placed to determine whether actual loss has been sustained. If a private right of action is granted, legislation would need to be amended to prohibit companies from contracting out of the right of action. Without such a provision, businesses will routinely write in a waiver of rights in all contracts, effectively making the right of action illusory. We recommend that consumer protection similar to that found in sections 7 and 8 of the Ontario *Consumer Protection Act, 2002* would be appropriate.⁵⁴

⁵² Bill C-28, *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act (Fighting Internet Wireless and Spam Act)*, 3rd Sess., 40th Parl., 2010 (First Reading in the House of Commons 25 May 2010). Formerly Bill C-27, same full name (shortened to the *Electronic Commerce Protection Act*), 2nd Sess., 40th Parl., 2009 (Second Reading in the Senate and referred to Committee 15 December 2009, died on the Order Paper).

⁵³ PIAC, "Spyware: Looking Out For Consumers" (June 2006), online: http://www.piac.ca/privacy/spyware_looking_out_for_consumers. See p. 22 and Recommendations at p. 65.

⁵⁴ *Consumer Protection Act, 2002*, SO. 2002, c. 30.

BUILDING A WORLD-CLASS DIGITAL INFRASTRUCTURE

Promoting Competition and Investment

The advances in telecommunications made over the last two decades have given service providers high levels of confidence in dismissing the need for consumer protection and minimum levels of service. The 2006 Policy Direction only strengthened deregulation as a priority for the regulator, the Canadian Radio-television and Telecommunications Commission, against which all of the telecommunications objectives enumerated in the *Telecommunications Act* had to be justified.⁵⁵

Without delving into the underlying methodology or criticisms of various telecommunications studies conducted, it is worth noting that several studies reach the same conclusion: Canadian telecommunications services, particularly broadband, are simply not measuring up in international rankings in terms of penetration, competition, choice, quality and price.⁵⁶ The inference that can be derived from the Berkman Center for Internet & Society at Harvard University Report on Next Generation Connectivity is that Canada's broadband market's duopoly characteristics have led to underperformance in the area of price and performance.⁵⁷ This inference was confirmed by remarks by the Governor of the Bank of Canada, Mark Carney: "Some possible explanations for why we both under-invest and appear to use capital so poorly include ... inadequate competition in some sectors, especially network industries that have spillovers throughout the economy, including telecommunications."⁵⁸

⁵⁵ Industry Canada, "Canada's New Government Issues Policy Direction to CRTC that Calls for Greater Reliance on Market Forces" (18 December 2006), online:

<http://www.ic.gc.ca/eic/site/ic1.nsf/eng/02149.html>. See also, *Telecommunications Act* (1993, c. 38).

Section 7 of the *Telecommunications Act* enumerates the various policy objectives of the Act.

⁵⁶ Berkman Center for Internet and Society at Harvard University, *Next Generation Connectivity: A review of broadband Internet transitions and policy from around the world* (February 2010), online:

http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Berkman_Center_Broadband_Final_Report_15Feb2010.pdf. See also the Organisation for Economic Co-operation and Development (OECD), *OECD Communications Outlook 2009*, online:

http://www.oecd.org/document/44/0,3343,en_2649_34225_43435308_1_1_1_1,00.html.

⁵⁷ Berkman Center, *Next Generation Connectivity*, *ibid.* at p. 11.

⁵⁸ Remarks by Mark Carney, Governor of the Bank of Canada to the Ottawa Economics Association in Ottawa, Ontario (24 March 2010).

Next Generation Networks and the Need for Increased Competition in the Broadband Market

Increasingly over the last several years, for most Canadian consumers, selecting a broadband internet service provider (ISP) has meant selecting between entities that are part of one or the other of a local duopoly of corporate families comprising incumbent telephone companies and incumbent cable telecommunications companies and their respective affiliates. This duopoly is not sufficient to meet the needs of Canadian consumers.

The vibrantly competitive internet services marketplace which existed when the Commission forbore from regulating retail residential internet services a decade ago has been replaced by an effective duopoly. It is clear that it is no longer the case that the marketplace is characterized by a “large number of service providers” as it was when the Commission forbore at the end of the 1990s. It is also no longer the case that “essential facilities and other underlying telecommunications transmission facilities are readily available from the telephone companies at tariffed, nondiscriminatory rates, and other sources of supply of transmission facilities are emerging.”⁵⁹

The recent CRTC proceeding considering the appropriateness of mandating certain wholesale high-speed access services demonstrated that the facilities that competitors (other than the incumbent telcos and cablecos) need are not readily available and those underlying facilities that are provided by the incumbent telcos and cablecos to independent ISPs are inadequate or simply designed for failure.⁶⁰ Denial of facilities that competitive ISPs need in order to compete has resulted in the exit or contraction of competitors and in turn has resulted in a substantial lessening of competition so that today the share of the internet services marketplace held collectively by competitors that are not incumbents is well below 10%.

In order for the independent competitors to compete in the internet market, the underlying services and facilities the incumbents provide must offer ISPs that purchase them a reasonable opportunity to offer their own retail customers broadband internet services that are credible alternatives to the incumbents' own retail services. Consumers will not buy competitor retail offerings that offer inferior functionality, such as for example, obsolete transmission speeds. For consumers, competition based on inferior wholesale services or facilities is not effective or efficient competition.

The marketplace for residential broadband internet services requires more competition than what is likely to be provided by the incumbents. In order to achieve and to maintain adequate competitiveness in the broadband internet services marketplace, incumbents of wholesale services must offer independent ISPs a reasonable opportunity to offer their retail customers broadband internet services that are credible alternatives to the incumbents' own retail services.

⁵⁹ Telecom Order CRTC 99-592, *Forbearance from Retail Internet Services* (25 June 1999) at para. 5.

⁶⁰ Telecom Notice of Consultation CRTC 2009-261, *Proceeding to consider the appropriateness of mandating certain high-speed access services*.

The government must pursue open access policies for telecommunications infrastructure, in particular the next generation internet networks, as a means of sustaining and improving competition in the telecommunications sector. Indeed, this was also one of the recommendations of the Senate Standing Committee on Transport and Communications in a Digital Plan for Canada.⁶¹ Other countries have recognized the shortcomings of competition in their wholesale market. One such country is Australia, who recently created functional separation in their broadband market by structurally separating the high capacity backbone network of Telstra, the incumbent telecommunications carrier, into separate wholesale and retail branches to promote competition in the wholesale market.⁶² While such a solution would likely be unworkable in Canada, the government must pursue a robust regulated wholesale market for internet services in Canada.

The 2006 Telecommunications Policy Direction Must Be Reworked or Rescinded

In 2006, the federal government issued a Policy Direction to the CRTC to “rely on market forces to the maximum extent feasible” in implementing the objectives of the *Telecommunications Act*.⁶³ When relying on regulation, the CRTC is directed to use measures that are efficient and proportionate to their purpose and that interfere with the operation of competitive market forces to the minimum extent necessary to meet those policy objectives. This instrument amounts to a direction for deregulation in the telecommunications sphere and ties the regulator’s hands unduly. This leaves Canadians vulnerable to abusive market practices, degradation of service quality, unjust discrimination, and unreasonably high rates.⁶⁴

The Policy Direction has only exacerbated the lack of meaningful competition in the Canadian telecommunications industry, as dominant providers carve up the market between themselves and only reluctantly allow competitors to use their facilities. Market forces have delivered prices and speeds for Canadian consumers that are, at best, in the middle of the pack in comparison with other advanced economies with broadband internet service, for example. This appears to be particularly true at the higher segments of the marketplace (i.e. higher speed services) such as in the wireless market.⁶⁵ Mediocre performance is simply not good enough for Canadian consumers and not consistent with the achievement of competitiveness at domestic or international

⁶¹ Senate Standing Committee on Transport and Communications, “Plan for a Digital Canada”, *supra* note 6 at Recommendation 14.

⁶² Minister for Broadband, Communications and the Digital Economy, Media Release: “Historic reforms to telecommunications regulation” (15 September 2009), online: http://www.minister.dbcde.gov.au/media/media_releases/2009/088.

⁶³ Policy Direction, *supra* note 55.

⁶⁴ Philippa Lawson, “Gutting the Telecom Act” in *For Sale To the Highest Bidder: Telecom Policy in Canada*, eds. Marita Moll & Leslie Regan Shade, Canadian Centre for Policy Alternatives (2008).

⁶⁵ Berkman Center Report, *Next Generation Connectivity* and OECD *Communications Outlook 2009*, *supra* note 56.

levels. Since the Policy Direction, there have been no noticeable price decreases for consumers.

With the emphasis on market forces, the Policy Direction has resulted in the effective or *de facto* withdrawal of the CRTC from many consumer protection requirements part and parcel of treating the incumbents and the competitors in the same fashion. Of particular concern is the impact of the Policy Direction on non-economic regulatory measures that serve to support important social goals. The Policy Direction requires non-economic regulatory measures to be “implemented in a symmetrical and competitively neutral manner.” The application of the Policy Direction to non-economic social regulatory measures has resulted in the erosion of key consumer rights, dismantling many areas of former consumer protection for telecommunications consumers. The Policy Direction confuses tools like competition with objectives such as access and affordability.

One such erosion of consumer rights includes the conclusion that competition in local telephony should be adequate to defend service quality.⁶⁶ The Commission eliminated the majority of reporting performance indicators and standards requirements for retail quality of service indicators, finding that complaints-based regimes were suitable to monitor quality of service. However, the complaints-based approach is inappropriate because the information collected from complaints does not allow the CRTC to assess the problem in a systematic or comprehensive fashion.

In the proceeding examining confidentiality provisions and privacy services for telecommunications customers, consumer privacy was eroded when the CRTC allowed telecom service providers to share confidential customer information with their affiliate networks.⁶⁷ Such sharing of confidential customer information is not in accordance with PIPEDA and allows telecom service providers to share with their affiliates details about their customers, such as account information, call or internet surfing records, and customer preferences. As well, telecom service providers have a wide-range of affiliate structures and the potential for extensive disclosure of sensitive personal information without express consent significantly erodes consumer privacy with their telecom service providers.

Another example for wireline telephone service was the Commission’s move to streamline regulation of disconnection and deposit policies in forborne markets in the name of competitive neutrality and regulatory symmetry. The Commission directed the CCTS to develop an industry code for disconnections and deposits that was as symmetrical as possible to all local exchange carriers.⁶⁸ Such a move marked an unusual departure from the usual CRTC public consultation process, which allows public interest groups to participate and represent consumers by providing intervenor costs through the rules. The development of the industry code led by the CCTS provided no

⁶⁶ Telecom Decision CRTC 2008-105, *Retail quality of service regime in non-forborne markets* (6 November 2008).

⁶⁷ Telecom Regulatory Policy CRTC 209-723, *Regulatory measures associated with confidentiality provisions and privacy services* (25 November 2009).

⁶⁸ Telecom Regulatory Policy CRTC 2009-424, *Revised regulatory requirements for management of customer accounts* (17 July 2009).

such mechanism, resulting in very cursory consumer representation. More importantly, this draft code has been rejected by CCTS, industry board members and criticized in other hearings.⁶⁹ The result at present is the lack of any regulation of the crucial consumer issues of deposits and especially disconnections.

The chilling effect of the Policy Direction emboldens carriers to act as a law unto themselves and recent behaviour. For example, Rogers in 2009 introduced a “government regulatory recovery fee” purportedly to help fund costs relating to regulatory proceedings. This regulatory fee is discussed in greater detail below in a section detailing the practice of charging extra fees. Residential directory phone books are no longer widely distributed as required by the basic service objective and are only delivered at the customer’s request after the CRTC staff cited the Policy Direction in a letter informing interested groups that Yellow Pages Group need no longer distribute phonebooks without a customer request in most large Canadian wireline telephone markets.⁷⁰ Bell and TELUS have been aggressive in limiting what is included in basic “stand-alone” service.

There is no requirement for re-regulation where the Commission finds that competition is insufficient to protect the interests of consumers, such as when service providers consolidate after a period of competition. The social value of telecommunications must be recognized and balanced with the goal for a competitive telecommunications marketplace. Effective consumer protection against market abuses is necessary and there must be measures in place to combat market failures.

The Policy Direction must be rescinded, or at minimum, reworked. Since its introduction, consumer protection has been stripped away and no benefits have materialized in terms of price, increased competition or substantial improvements to service offerings, such as speed or quality of service. Legislative change is also required because the current Act does not deal with new phenomena, such as convergence in the telecommunications market. The CRTC must have the scope and flexibility to act appropriately in response to future developments and to preserve regulations that protect Canadian telecommunications consumers.

Net Neutrality or “Internet Traffic Management Practices” and the Supply of Bandwidth

Internet neutrality or “net neutrality” is an issue that has been a topic that has sparked much political, legal, technical and even moral debate. Internet service providers claim that their networks are at capacity and blame consumers for slowing down the network by using applications such as BitTorrent. Instead of upgrading their network, ISPs have turned to technical measures to control their customers’ bandwidth consumption through

⁶⁹ Telecom Notice of Consultation CRTC 2010-247, *Review of the Commissioner for Complaints for Telecommunications Services*. The industry code for deposits and disconnections was discussed in submissions. The oral hearing is scheduled to take place on September 27-29, 2010.

⁷⁰ Letter by the Canadian Radio-television and Telecommunications Commission to the Yellow Pages Group, “Re: distribution of residential telephone directory listings” (2 June 2010).

“throttling” and “packet shaping” specific internet protocols or applications, while introducing pricing mechanisms that supposedly place economic incentives for consumers to carefully budget their use of bandwidth.

Prominent consumer concerns are centered upon how net neutrality plays into universal access, privacy, censorship and the commercialization of the internet.⁷¹ But at the heart of the consumer perspective is what type and quality of service consumers expect from their internet service providers and how they are charged for this service.

Indeed, this topic was recently debated at a CRTC regulatory proceeding examining the “internet traffic management practices” of internet service providers in Canada, such as throttling and packet shaping.⁷² The CRTC determined that all ISPs could continue existing internet traffic management practices until challenged with an official complaint under an analytical framework. The framework placed a high evidentiary burden on the complainant seeking to challenge throttling and other ISP practices that raised the issue of net neutrality. Traffic management practices may lead to such consumer woes as narrowed choice of services and segmented pricing plans based on usage profile gleaned from information about application use.

Several legal and policy developments on net neutrality have emerged in the United States and the European Union. Given that the EU and the United States appear to be moving in a direction that wholly recognizes neutrality as a principle for the internet and enumerates principles to protect their broadband customers, Canada’s regulatory efforts may have set us back.⁷³ The time has come for Canadian government leadership to preserve net neutrality and internet freedom. The government must ensure that consumers are guaranteed rights with their internet access.

PIAC has previously advocated for the following consumer internet rights:

- use their internet connection to access the lawful content, applications or services of their choice without

⁷¹ PIAC, “Staying Neutral: Canadian Consumers and the Fight for Net Neutrality” (November 2009), online: http://www.piac.ca/telecom/canadian_consumers_need_more_net_neutrality/.

⁷² Telecom Public Notice CRTC 2008-19, *Review of the Internet traffic management practices of Internet service providers*, resulting in Telecom Regulatory Policy CRTC 2009-657, *Review of the Internet traffic management practices of Internet service providers* (21 October 2009). See also Telecom Decision CRTC 2010-445, *Modifications to forbearance framework for mobile wireless data services* (30 June 2010).

⁷³ In the European Union, the EU Telecom Reforms package revised the regulatory framework for the telecoms sector in Europe after the European Parliament and Council of Ministers reached an agreement on 4 November 2009 which implements transparency requirements so consumers will be informed about traffic management techniques and their impact on service quality. See online: http://ec.europa.eu/information_society/policy/ecomms/tomorrow/index_en.htm. In the United States, the Federal Communications Commission adopted a policy statement in 2005 stating its adherence to four principles of network neutrality and in 2007 found Comcast to be violating these net neutrality principles. While the FCC’s order against Comcast was overturned due to jurisdictional issues, the FCC has since stated that will still continue the fight for net neutrality. President Obama has been a vocal advocate for net neutrality and there remain a couple bills before the US Senate and House of Representatives to preserve internet freedom.

discrimination, modification, interruption, or delay of their internet transmissions by any party, subject to law.

- information about the user's access to the internet, including the speed, limitations, and network management practices of the user's internet service at any given time
- pay similar prices for similar internet access services and freedom from price discrimination based on individual usage profiles.
- be free from surveillance and have their privacy protected when using the internet except where authorized by law.
- access the internet via the service provider of their choice, where facilities permit.
- attach any device to their network, provided the device does not physically damage the network or substantially degrade the use of the network by other subscribers.
- challenge any derogation from these rights in a simple, free complaints mechanism, or at law.
- broadband internet access at minimum speeds in accordance with standards set by the federal government.⁷⁴

Broadband Speed Claims

One issue that is part and parcel of net neutrality is broadband speed advertising in Canada. Most ISPs advertise their speeds as “up to” speeds. These speed claims are difficult for consumers to verify and have been criticized as achievable only under ideal conditions such as being on a short connection, with high quality wiring, in the absence of normal and usual electrical interference, accessing very rapid websites and absent competing demands of other users sharing the same hardware and software. Given that many Canadian ISPs have implemented internet traffic management practices, the “up to” speeds seem more akin to a pie in the sky hypothetical promise to consumers.

Several countries have already taken measures to clarify broadband speed and service claims made in print, online and oral representations and advertising. ISP practices have attracted regulatory scrutiny in Australia and Britain, with Australia issuing guidelines for ISP speed advertising, requiring companies not to advertise “maximum”, “up to” or “peak network” speeds if those speeds are not generally achievable or likely to be achieved by consumers using the network.⁷⁵ However, the issue of broadband speed claims has not yet made it onto the radar of Canadian regulators either at the Competition Bureau or the CRTC, so far only attracting the ire of Canadian consumers who do not feel they are receiving the speeds they are paying for.

⁷⁴ PIAC, “Staying Neutral: Canadian Consumers and the Fight for Net Neutrality”, *supra* note 71 at p. 87.

⁷⁵ Australia Competition & Consumer Commission, “Mobile and Other Wireless Internet Speed Claims and the Trade Practices Act 1974: An ACCC Information Paper” (September 2009).

Expand Universal Service to Include Broadband

It is important to review how the concept of basic service became established as a desirable public goal. The idea of basic service and the basic service objective is intrinsically bound up in the concept of universal service. Universal service has been described as follows:

“Universal Service is concerned with the making available of the provision of a certain defined set of telecommunications services as widely as possible, both geographically and socially.”⁷⁶

It is appropriate to note that Theodore Vail, Chairman of AT&T, brought the term “universal service” into the regulatory telephony parlance in 1907. Vail advanced the fact that the acceptance of a policy that service would be extended to anyone in a particular area by a provider that was guaranteed to be the sole service provider in that area. The concept of universal service continued to evolve to include the idea that service must not only be accessible but also feature affordable rates. Subsidies to subscribers in high cost regions or guaranteed attachment to the network for disadvantaged groups or important purposes were part of this idea. The American *Telecommunications Act of 1996* provided a statutory foundation for universal service, which recognized universal service as “an evolving level of telecommunications service.”⁷⁷

The United States in 2009 made an effort to make broadband, or high-speed access to the internet, available to all Americans. As a result, they have a *National Broadband Plan* with the goal of achieving 100% universal access and minimum speed targets.⁷⁸ The European Community is considering the addition of broadband to a level of telecommunications services that may be required to establish universality. In September 2009, the European Commission adopted guidelines on public funding of broadband service, which further the policy that “all Europeans must have access to high speed broadband.”⁷⁹

In Canada, the CRTC previously affirmed that one of the Commission’s objectives was to determine how best to ensure that local service remains accessible and affordable in

⁷⁶ Ian Walden and John Angel, *Telecommunications Law and Regulation*, Oxford University Press, 2nd Ed. (2005).

⁷⁷ 47 U.S.C.

⁷⁸ United States National Broadband Plan, *supra* note 2.

⁷⁹ See EU 2002 Universal Services Directive, online:

<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/394&format=HTML&aged=0&language=EN&guiLanguage=en>. The EU 2002 Universal Services Directive provided for affordable access to public switched networks including access to the Internet, but left the specifics of compliance up to the individual states. As a result, many of the countries in the European Union are following parallel strategies with the EC. Finland, for example, has recently passed a law that guarantees all citizens access to broadband by July 2010. In Britain, the “Digital Britain” report issued in June 2009 gave a Universal Services Commitment to connect all households with a 2 Mbps connection.

compliance with the objectives set out in section 7 of the *Telecommunications Act*.⁸⁰ In doing so, the obligation to serve was formalized as the cornerstone of such universal service objectives and the contents of the basic service specified, which are discussed in greater detail below.⁸¹ The Commission then noted that the basic service objective is independent of the technology used to provide the service and may change over time as service expectations evolve. In order to ensure that the current Canadian framework for universal service was complete, a contribution based on revenues from service providers was established to fund high cost serving areas.⁸²

Broadband access is crucial to Canadian consumers. It has been described by the Minister of Industry as “one of the key elements of 21st century infrastructure” and “a key component of a digital economy.”⁸³

Rural and Remote Areas

Canada lacks a comprehensive strategy for universal broadband access, especially for ensuring such access in rural and remote regions. Several economic and social goals for increased broadband connectivity in society:

- Efficiency, or the ratio of output to cost (for managing inventories and deliveries, through use of information on weather and soil content to improve agricultural yields, for monitoring and managing energy use through “smart grids”, etc);
- Effectiveness, or the quality of products and services (such as improving health care through telemedicine);
- Equity, or the distribution of development benefits throughout the society (such as to rural and remote areas, to minorities and disabled populations);
- Reach, or the ability to contact new customers or clients (for example, craftspeople reaching global markets on the Internet; educators reaching students at work or at home).⁸⁴

⁸⁰ In Telecom Public Notice CRTC 95-49, cited in Telecom Decision CRTC 96-10, *Local service pricing options* (15 November 1996). Section 7(b) of the *Telecommunications Act* states: “to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada”.

⁸¹ Obligation to serve was discussed in Telecom Decision CRTC 86-7, *Review of the general regulations of the federally regulated terrestrial telecommunications common carriers* (26 March 1986) at para. 4.2. Basic service was specified in Telecom Decision CRTC 99-16, *Telephone service to high-cost serving areas* (19 October 1999) at para. 24.

⁸² Telecom Decision CRTC 2000-745, *Changes to the contribution regime* (30 November 2000) provided that a high cost serving area (HCSA) is a clearly defined geographical area where the incumbent local exchange carrier’s monthly costs to provide basic service are greater than the associated revenues generated by an affordable rate as approved by the Commission.

⁸³ The Honourable Tony Clement, PC, MP, Minister of Industry at the Canada 3.0: Defining Canada’s Digital Future conference, Stratford, Ontario (8 June 2009).

Such principles can impact society and the economy in concrete ways when broadband is introduced, in the areas of health care (e.g. telemedicine); energy (smart grid); education (distance learning); government operations (citizen information and engagement); economic opportunity (job creation and job training); and public safety (interoperable emergency communications) amongst others.⁸⁵ Broadband access is crucial to social and economic development, especially for rural and remote areas that cannot retain skilled workers or competitive businesses without it. Citizens cannot engage with government or their colleagues or friends elsewhere in the way that communication has developed over the internet in recent years without broadband access.

As well, there is a strong economic case for the continuation of a universal service obligation in a market where changing technologies are altering the mechanisms whereby basic service, or the needs served by basic service, can be delivered. This is partly because of the externalities associated with the provision of universal service. These externalities include the well-known principle that the greater the size of the network, the greater the benefit to other users of the network. Such externalities may also include economy-wide benefits, including the reduction of transportation needs and better and more efficient access to commerce. These externalities may justify a departure from a market approach to interconnection on economic grounds alone.

Broadband services have become an important network for the delivery of a wide range of services including telephony. The concept of universal service has become more important than ever with next generation networks and there now exists much public policy support for a universal service obligation that includes broadband. The Broadband Task Force in 2001 recommended an action plan that would have seen access to broadband in all Canadian communities by 2004. The Telecommunications Review Panel Report of 2006 urged the creation of a national strategy for adoption of ICTs, noting the effect of improved broadband connectivity as “a prime means of spreading the social and economic objectives of information technology.”⁸⁶ It too recommended that government “immediately commence a program to ensure that affordable and reliable broadband services are available in all regions of Canada, including urban, rural and remote areas, by 2010 at the latest.”⁸⁷ PIAC agrees with the June 2010 Senate Standing Committee on Transport and Communications recommendation that the government in its digital strategy should define universal as 100 per cent of its citizens.⁸⁸

⁸⁴ Dr. Heather Hudson in Appendix B of Consumer Group’s Evidence submitted in Telecom Notice of Consultation CRTC 2010-43, *Proceeding to review access to basic telecommunications service and other matters* (to be heard on 25 October 2010) at pp. 1-2.

⁸⁵ Dr. Heather Hudson, *ibid.*

⁸⁶ Telecommunications Policy Reform Panel, Final Report (2006) at p. 7-43.

⁸⁷ Telecommunications Policy Reform Panel, *ibid.* at Recommendation 8-1.

⁸⁸ Senate Standing Committee on Transport and Communications, “Plan for a Digital Canada”, *supra* note 6 at Recommendation 5.

As discussed above, several major economies and countries have recently reaffirmed their commitment to universal service in the broadband internet era, notably the European Union and the United States. In all of these countries, it is explicitly stated or implied by the terms of the plan that universal service objectives now must be updated to include broadband.

PIAC is currently involved in the CRTC proceeding, Telecom Public Notice CRTC 2010-43, *Obligation to serve and other matters*, which discusses the scope of incumbent local exchange service providers' obligation to serve and the basic service objective, which currently requires:

- Individual line local service with touch-tone dialing provided by a digital switch with capability to connect via low speed data transmission to the internet at local rates;
- Enhanced calling features, including access to emergency services, Voice Message Relay service, and privacy protection features;
- Access to operator and directory assistance services;
- Access to the long distance network; and
- A copy of a current local telephone directory.⁸⁹

The proceeding also raises issues surrounding the local service subsidy. The basic service objective has not been updated since 1999 to expand its definition to include a target internet speed or specific type of internet connection.

In the proceeding, PIAC is arguing that the Commission should update the basic service objective to include access to a broadband internet connection. Furthermore, PIAC suggested that in order to have measurable results for Canadians and to help ensure Canadians have access to the internet that compares favourably with the United States, EU countries and other leading OECD countries, the Commission should set a minimum broadband speed for the new basic service objective.⁹⁰ PIAC submitted that the basic service objective broadband speed target should at least match, and preferably exceed the US target speed of 4 Mbps download, 1 Mbps upload to be achieved by 2020, with an interim speed goal such that by 2015, the universal broadband service objective broadband speed objective should be at least 2 Mbps download and 800 Kbps upload.

As well, PIAC prepared a model contribution regime to support broadband expansion in "high cost high speed internet service areas" should the Commission consider adding broadband connectivity to the basic service objective.

PIAC is particularly concerned about how the Policy Direction (discussed above) will affect the CRTC's ability to regulate to ensure affordable access to telecommunications

⁸⁹ Telecom Decision CRTC 99-16, *Telephone service to high-cost serving areas* (19 October 1999) at para. 24.

⁹⁰ The United States National Broadband Plan set a universal availability target actual download speed of 4 Mbps to be achieved by 2020.

services in rural and remote regions in Canada, where market forces are considerably less effective. We doubt that a reformed universal service objective could be met by market forces alone.

The Canadian broadband market is largely a duopoly maintained by the incumbent local telephone service provider and the cable company. Independent studies appear to confirm that the duopoly characteristics of the market have likely led to underachievement in the area of price and performance.

Affordability of Telecommunications Services

Universal service requires both availability and affordability. Affordability of telecommunications services is a key concern especially for rural and remote areas. Satellite broadband is an option in rural and remote areas, however the price of satellite equipment and service can be prohibitively expensive for some households and the speeds considerably lower than the speed designated as broadband by Industry Canada.⁹¹ While wireless broadband coverage is being substantially extended, wireless broadband services remain too expensive in terms of usage and download charges compared to most DSL and cable services. Thus, affordability remains an issue even where broadband is available to individual households in rural and remote areas.

The Wireless Industry

Wireless revenues remain the single largest revenue component for Canadian telecommunications providers, representing 40% of total telecom revenues in 2008, up from 37% in 2007. Wireless revenues, excluding paging, amounted to \$9.3 billion in 2004 and increased to \$15.9 billion in 2008, representing an average annual growth rate of 14.3%.⁹² Wireless data revenue growth was considerably higher at an annual rate of 35.2% in 2008.⁹³

Pricing for Canadian mobile phone service and mobile data services is among the highest in the developed world, as highlighted by a recent Communication Outlook report published by the OECD.⁹⁴ Canada ranked 20th out of 30 states for low usage, 28th out of 30 states for medium usage and 18th out of 30 states for high usage. Canada ranked last for wireless penetration among the 30 states surveyed with only 62 wireless subscribers per 100 people.

⁹¹ See chart submitted by Barrett Xplore in response to Interrogatories for Telecom Notice of Consultation CRTC 2010-43, PIAC(Barrett)20May10-1.

⁹² Canadian Radio-television and Telecommunications Commission, *Communications Monitoring Report 2009* (August 2009), online: <http://www.crtc.gc.ca/eng/publications/reports/policymonitoring/2009/2009MonitoringReportFinalEn.pdf> at pp. 235-237.

⁹³ CRTC, *Communications Monitoring Report 2009*, *ibid*.

⁹⁴ OECD, *OECD Communications Outlook 2009*, *supra* note 56.

As well, wireless services are the type of service that receives the most complaints according to the 2007-2008 and 2008-2009 CCTS Annual Reports.⁹⁵ In fact, billing complaints comprise the largest portion of all complaints received by the CCTS at 33% of all complaints received by the CCTS.

Industry Practice of Charging Extra Fees

The practice of charging extra fees, such as a “system access fee” or “activation fee” are often employed widely by the wireless industry and perceived by consumers as a cash grab. Wireless companies present these charges as mandatory costs passed through to customers separately and cause problems with transparency and competition, as suppliers advertise prices that are lower than the total final cost to consumers. PIAC recommends an outright ban on the practice with consumer protection legislation requiring any advertising or representation to include an “all-in” price that is prominently featured.⁹⁶

Rogers in 2009 introduced a “government regulatory recovery fee” charged to new customers amounting to between \$2.50 and \$3.50, depending on the province, applied to “help fund fees, costs or other amounts related to federal, provincial and/or municipal mandates, programs and requirements such as provincial 911 fees, spectrum acquisition, licensing charges, and contribution charges to help subsidize telephone service in rural and remote areas.”⁹⁷ Such a line fee may mislead consumers by intimating a government requirement to collect such a fee on behalf of the government when there is no such duty. The CRTC reviewed the fee and determined that no public process on the matter was needed.⁹⁸

The government’s action to ensure that Canadian consumers have access to greater competition has resulted in consumers having or soon having access to six and possibly seven competitors in the wireless telephony marketplace. System access fees and activation fees are beginning to disappear as some companies are advertising “all-in” pricing, however, an outright ban on unjust extra charges would better protect Canadian consumers.

⁹⁵ Commissioner for Complaints for Telecommunications Services (CCTS), *Annual Report 2007-2008* (October 2008), online: <http://www.ccts-cprst.ca/wp-content/uploads/2010/01/CCTS-Annual-Report-2007-2008.pdf> at p. 13. Complaints about wireless telephone service comprised 31% of all complaints. See also Commissioner for Complaints for Telecommunications Services (CCTS), *Annual Report 2008-2009* (October 2009), online: <http://www.ccts-cprst.ca/wp-content/uploads/2010/01/CCTS-Annual-Report-2008-2009.pdf> at p. 18. Complaints about wireless telephone service comprised 38.01% of all complaints.

⁹⁶ PIAC, “The Practice of Extra Charges in the Canadian Marketplace” (August 2009), online: http://www.piac.ca/consumers/curb_those_extra_fees_piac_report_calls_for_consumer_protection_legislation/.

⁹⁷ See <http://www.rogers.com/regulatoryfee>.

⁹⁸ Letter by the Canadian Radio-television and Telecommunications Commission to Rogers Communications Inc., “Re: Government regulatory recovery fee on wireless bills” (27 November 2009).

Roaming Charges

The European Parliament has enacted new rules for its members to regulate wireless fees and protect European consumers.⁹⁹ These rules including: limits on the price for sending a text message while abroad; reduction in the cost to surf the internet and download movies or video programs with a mobile phone with a maximum wholesale cap; reduction in the price for mobile roaming calls; and protection for consumers from “bill shocks” with the introduction of a cut-off mechanism once the bill reaches a set price, unless the consumer chooses a different cut-off limit.¹⁰⁰ Canada would do well to bring similar rules to the Canadian wireless marketplace, as these would greatly improve protection for Canadian wireless consumers and likely see a reduction in consumer complaints about wireless services and billing practices. These rules also improve the accessibility and affordability of wireless services while making wireless bills more predictable for consumers, with the effect of promoting mobile commerce. Canadian consumers are more likely to make use of wireless data services if they are cheaper and pricing is predictable. This mirrors a recommendation from the Senate Standing Committee on Transport and Communications: that Industry Canada and the CRTC should work with the Canadian Wireless Telecommunications Association and individual Canadian wireless service providers to develop a technological procedure for informing users when their usage will push the monthly bill past a set limit.¹⁰¹

⁹⁹ European Commission, “The new proposal for reducing roaming prices,” (2009) online:

http://ec.europa.eu/information_society/activities/roaming/regulation/index_en.htm#new_rules.

¹⁰⁰ Regulation (EC) No. 717/2007 of the European Parliament and of the Council on roaming on public mobile communications networks within the Community (27 June 2007), amended by Regulation (EC) No. 544/2009 of the European Parliament and of the Council (18 June 2009).

¹⁰¹ Senate Standing Committee on Transport and Communications, “Plan for a Digital Canada”, *supra* note 6 at Recommendation 13.

OTHER DIGITAL ISSUES

Government Department Reorganization

PIAC has previously advocated for the separation of the Office of Consumer Affairs from Industry Canada. The current Industry Canada department structure is based on a 1993 reorganization implemented by the 1994 *Department of Industry Act*. It was based on the propositions that consumer and industry interests should be reconciled within the same portfolio and that all departments should be responsive to consumers of the products and services overseen by their mandate. Unfortunately, neither has occurred. Consumer Affairs is a miniscule branch constituting 0.4% of the personnel and 0.5% of the budget of Industry Canada. To the best of our knowledge, there are no departmental roundtables, management advisory committees or task forces where consumers have a seat. Other departments do not have consumer affairs briefs and for the most part, have minimal concerns with consumer protection from a marketplace standpoint.

We believe that a reorganization of department structure to move Consumer Affairs out of the Department of Industry would help rebalance perspectives and better serve Canadian consumers. It is preferable to have a dedicated consumer affairs ministry with presence at the cabinet table and an independent voice for consumers and consumer issues. This would also help consolidate the government response to a myriad of marketplace concerns of Canadians in one location and provide a visible consumer presence in government. PIAC has also argued in the alternative that the portfolio of the Minister of State for Small Business and Tourism be revised to include consumer affairs, forming the Ministry of State for Small Business, Consumer Affairs and Tourism.

The Senate Standing Committee on Transport and Communications in their Digital Plan for Canada report recommended the appointment of a Minister for Digital Policy who would take over the oversight of the strategy from the Minister of Industry.¹⁰² If such a Minister for Digital Policy is created, then there should be resources within that portfolio devoted to digital consumer protection issues and ideally a sub-branch focused on digital consumer issues. Conversely, if a Minister of Consumer Affairs is created separate from the Minister of Industry or subsumed by a portfolio outside of Industry, then a branch within Consumer Affairs should be focused on digital consumer protection issues.

Consumer issues are growing in range and complexity. Consequently, free market mechanisms alone cannot be expected to adequately deal with consumer concerns. Canadians in all regions of Canada have similar expectations for government action in the event of market failure. Increased policy emphasis on consumer protection is in line with the developments that have occurred and are occurring within the governments of

¹⁰² Senate Standing Committee on Transport and Communications, "Plan for a Digital Canada", *ibid.* at Recommendation 2 on p. 12.

Canada's major trading partners, such as the United States, European Union and Australia.¹⁰³

¹⁰³ In the United States, the Federal Trade Commission deals with both consumer protection and competition jurisdiction in broad sectors of the economy with a dedicated Bureau of Consumer Protection. The European Union Directorate General for Health and Consumers is dedicated to making European citizens healthier, safer and more confident. In Australia, the Australian Competition and Consumer Commission promotes competition and fair trade in the marketplace to benefit consumers, business and the community.