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The Politics of BYOD

Canada's minister of State (Finance) Ted Menzies announced that the country's Code of Conduct for the Credit and Debit Cards Industry will be expanded to include mobile payments.

"More and more Canadians are using their smartphones to pay at stores and small businesses, and that trend will grow. While we support new and convenient payment options, small businesses and consumers should not be punished with new hidden fees or undisclosed conditions," said Menzies.

NEW CRTC CHAIRPERSON INTENSIFIES CONSUMER Focus with National Wireless Code

GEOFFREY WHITE



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An Intensified Consumer Focus for the CRTC

On June 8th, 2012, Prime Minister Stephen Harper announced that Jean-Pierre Blais would take the helm of Canada's telecommunications regulator the Canadian Radio-television Telecommunications Commission (CRTC) for a 5-year term, effective June 18.¹ In his first three months as Chairperson, Mr. Blais quickly intensified the CRTC's focus on consumer protection by creating a Chief Consumer Officer position; setting out a 3-year work plan that emphasizes consumer protection as one of the three key pillars of create, connect and *protect*²; and overseeing a high-profile denial of BCE Inc.'s \$3.4B bid to purchase Astral Media Inc. for failing to demonstrate that the deal was in the public interest.³

In keeping with this consumer-oriented focus, on October 11, 2012, the CRTC decided to break with the past and intervene in the wireless marketplace by establishing a national code regarding wireless service contracts.

This decision sets the stage for what will be another high-profile, high-stakes hearing, and also looks ahead to what promises to be a very interesting year for telecommunications in 2013.

Consumer Frustration with the 'Light-Touch' of the CRTC in Wireless Services

In the mid-1990s, citing sufficient levels of competition in the wireless industry, the CRTC determined it would forbear, *i.e.*, refrain, from regulating the Canadian wireless industry, allowing market forces to guide the industry's growth.

In the context of this "light touch" approach of the CRTC, as well as reported consumer frustration over wireless services contracts and poor customer service by certain wireless service providers, several provinces intervened. Quebec began in 2009 by introducing amendments to its consumer protection laws, and in the coming years Manitoba, Newfoundland and Labrador, Ontario and Nova Scotia followed, loosely modeling their rules on Quebec's, and each prescribing rules about unilateral (one-sided) amendments to optional

services and features, cancellation rights, early termination fees, device subsidies, notice requirements, and what must be included in subscriber contracts. While the various provincial rules contain a number of similarities, there are certain differences, differences that some wireless service providers (WSPs) have argued require a complicated and costly compliance effort for WSPs that serve customers in more than one province, requiring more training for customer contact representatives, and more complexity in billing systems. For example, the method of calculating cancellation fees found in the Quebec law and the Manitoba law is not the same. Although the thrust of the rule – which is to cap cancellation fees and device subsidy recovery – is the same, the approach is somewhat different^{4,5}.

CRTC Consultation regarding Intervention in Wireless Services

The CRTC (under former Chairperson Konrad von Finckenstein) took notice of these developments. In April of 2012, in response to a series of calls from consumers groups and certain wireless service providers alike to develop a national code regarding mobile wireless contracts, the CRTC initiated a consultation to consider whether conditions in the marketplace had changed sufficiently to warrant CRTC intervention, *i.e.*, reversing its past decision to not regulate wireless services.⁶

In response to the consultation, there were 272 submissions from consumers, businesses, most of the WSPs, and several provincial governments.

Many consumers expressed concern over the lack of competition in the Canadian wireless marketplace. Consumers and consumer interest groups cited concerns over choice of provider and pricing and these comments urged the CRTC to intervene on their behalf. These concerns are not surprising given the rise in complaints related to wireless services received by the Commissioner for Complaints for Telecommunications Services (CCTS), the agency established to handle complaints for unregulated telecommunications services in Canada, as shown in the Table on page 14.

- 1 <http://pm.gc.ca/eng/media.asp?id=4852>
- 2 <http://www.crtc.gc.ca/eng/com100/2012/r120831.htm>; and <http://www.crtc.gc.ca/eng/com100/2012/r120906.htm>
- 3 <http://www.crtc.gc.ca/eng/archive/2012/2012-574.htm>. At the time of writing, BCE Inc. has returned to the CRTC with another proposal to purchase Astral Media Inc.
- 4 <http://www.opc.gouv.qc.ca/WebForms/SujetsConsommation/ServicesAbonnements/Telecommunications/Resiliation.aspx>
- 5 <http://web2.gov.mb.ca/bills/39-5/b035e.php>
- 6 Telecom Notice of Consultation CRTC 2012-206, *Proceeding to consider whether the conditions in the Canadian wireless market have changed sufficiently to warrant Commission intervention with respect to retail wireless services* (4 April 2012) (TNC 2012-206).
- 7 Public Interest Advocacy Centre, Canada Without Poverty, and the Consumers' Association of Canada.

The Case For and Against Intervention

Leading the charge for CRTC intervention was a coalition of what some might call “strange bedfellows”: several consumers groups along with the so-called “Big 3” (Canada’s three largest wireless service providers) - Bell, Telus, and Rogers. The coalition called on the CRTC to exercise its power under Section 24 of the Telecommunications Act, which gives the CRTC broad power to impose “any conditions” on the “offering and provision of any telecommunications service by a Canadian carrier”. Their argument, and that of several other wireless service providers, was essentially this:

While these provincial measures may be motivated by calls for increased consumer protection in the area of wireless services, divergent legislative responses create a patchwork of different regulatory schemes across the country. This results in inconsistent regulation and increased compliance costs for the industry. In any industry, increased costs are typically reflected in increased prices.⁹

On the other hand, several new entrant WSPs questioned the Big 3’s motivation.

WIND Mobile, for example, suggested that the CRTC and Industry Canada (the federal spectrum regulator), should focus on wholesale access and inter-carrier infrastructure issues, that the call for a national code was an attempt to circumvent provincial legislation, and that there was nothing holding wireless service providers back from adopting and abiding by their own code of conduct.¹⁰ Mobilicity, similarly, warned that the CRTC should not be taken in by a watered-down, ineffective and inefficient set of standards.¹¹ Public Mobile supported a national code, but urged the CRTC to recognize that their focus should be the level of competition in the Canadian wireless marketplace.¹²

Interestingly, only 3 provinces responded. Manitoba (one of the Provinces legislating in this space) said that it might support a national code so long as the minimum

level of protection was equivalent to that provided by the Quebec and Manitoba laws.¹³ The Government of the Northwest Territories argued that the CRTC’s decision to forbear from the regulation of wireless services was premature, at least in the North, and that it would therefore support CRTC intervention.¹⁴

Saskatchewan did not file any comments, although Saskatchewan Telecommunications, a provincial Crown corporation, argued against CRTC intervention on the basis that it would interfere with an increasingly competitive marketplace, and besides, that the Provinces were well within their constitutional rights to develop consumer protection legislation and that CRTC intervention would unnecessarily complicate things.¹⁵

Quebec – the first province to legislate on the issue - was perhaps the most resolute, stating that regardless of what the CRTC deems appropriate, Quebec “will maintain its own legislation in this



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8 Telecommunications Act, S.C. 1993, c. 38, Section 24.

9 Shared Position Statement of Public Interest Advocacy Centre, Canada Without Poverty, the Consumers’ Association of Canada, Bell Canada, Telus Communications Company, and Rogers Communications (3 May 2012), TNC2012-206, at para. 3.

10 Comments of Globalive Wireless Management Corp. (3 May 2012), TNC 2012-206, paras. 44-45.

11 Comments of Data & Audio-Visual Enterprises Wireless Inc., dba Mobilicity (3 May 2012), TNC 2012-206, paras. 21, 29.

12 Comments of Public Mobile (3 May 2012), TNC 2012-206, para. 5.

13 Comments of the Minister of Healthy Living, Seniors and Consumer Affairs (Manitoba) (3 May 2012), TNC 2012-206, p. 1.

14 Comments of the Government of the Northwest Territories (2 May 2012), TNC 2012-206, p. 1.

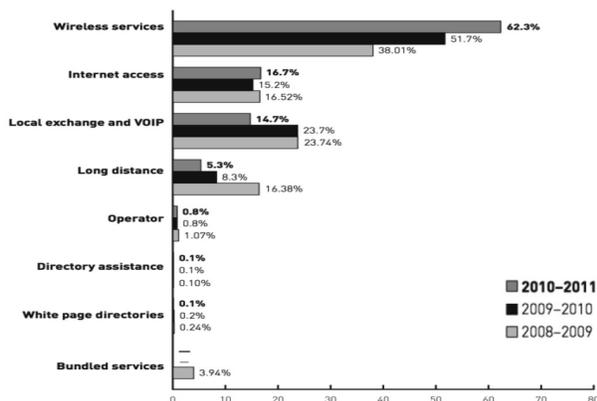
New German Mobile Office

Forget texting while driving. German police say they nabbed a driver who had wired his Ford station wagon with an entire mobile office.

Built on a wooden frame on his passenger seat they found a laptop on a docking station tilted for easy driver access, a printer, router, wireless internet stick, WLAN antenna, and an inverter to power it all. A navigation system and cellphone mounted to the windshield completed the array.

Since there was no evidence he used the office while moving, he got away with a € 120 (\$153) speeding ticket (130 km/h in a 100 km/h zone) and a possible fine for having unsecured items in his car.

**Table:
The Growing Share of Wireless Service Complaints**



Source: CCTS Annual Report 2010-2011, page 17

field, and that by virtue of its exclusive constitutional jurisdiction in matters of property and civil rights, which follow from the consumer and their contractual relationship with companies”.¹⁶

The CRTC's Decision – a New National Wireless Code

Using data from its annual *Communications Monitoring Report*¹⁷, the CRTC found that although the mobile wireless services market is subject to competition, regulatory intervention was needed in the form of a national code that addresses the “clarity and content of mobile wireless contracts and related issues”.¹⁸ The CRTC based its decision on what it called the “near-unanimous view of consumer groups, individual consumers, and other mobile WSPs” that such intervention was needed.

The CRTC also initiated another consultation¹⁹, whereby the CRTC is seeking the public's comments on the content of the code, to whom it should apply, and how the code should be enforced and assessed. The consultation, which includes an online consultation for the public, runs through to December 18, and ends with a public consultation in February 2013. Prior to the public hearing, the CRTC will issue a “draft code” document based on the interventions and replies, as a way to stimulate debate and focus submissions at the hearing. Grassroots group OpenMedia.ca, familiar to those who monitored the CRTC's proceeding in respect of usage-based billing, has launched an online campaign to help voice Canadians' frustrations.²⁰

Tensions within the Wireless Industry

This latest step by the CRTC to protect consumers, foreshadowed by the CRTC's appointment of a Chief Consumer Officer last August, highlights tensions within the industry – between new entrant wireless service providers on the one hand, and larger incumbents on the other – about the actual state of competition in the Canadian wireless market. It also may set the stage for a constitutional clash between provinces and their jurisdiction over contracts, and the federal government and its jurisdiction over telecommunications.

Although telecommunications is a matter of exclusive

federal jurisdiction, the provinces have jurisdiction over property and civil rights (which includes contracts and consumer protection). In setting out to establish a national wireless code governing wireless services contracts, the CRTC may find itself in a constitutional skirmish with the provinces (Quebec having drawn its line in the sand), and perhaps some of the carriers such as SaskTel and Mobilicity, over complex arguments about constitutional doctrines of paramountcy and interjurisdictional immunity. It will be interesting to see if any of the provinces react to the national wireless code.

Seeking Comments on the Wireless Code

The CRTC is seeking comments on (i) the content of the wireless code; (ii) to whom the code should apply; (iii) how the code should be enforced and promoted; and (iv) how the code's effectiveness should be assessed.

The content of the code itself is likely to occupy most of the CRTC's time, while the other issues are of secondary importance and more likely to generate consensus. In terms of to whom the code should apply, it is expected that the CRTC will require full compliance by all WSPs, and will not allow for any special treatment. In terms of how the code should be enforced and promoted, the CRTC's newly created Chief Consumer Officer will likely have that task. If not, it may fall into the hands of the Commissioner of Complaints for Telecommunications Services (CCTS), the agency charged with resolving complaints about unregulated telecommunications services, who may see its mandate broadened. In terms of how the code's effectiveness should be assessed, it is likely that the CRTC itself will conduct periodic reviews, as it does for the CCTS.

The content of the code, of course, will be the major focus, and it will be interesting to see what the outcome of the CRTC process will be. Unlike the CRTC's industry committee process, where lack of industry consensus can act to frustrate meaningful progress on an issue, in the case of this proceeding the CRTC will not be encumbered by the need to achieve consensus, although it is expected that the CRTC will work very hard to achieve it. Whether that results in the code being the lowest common denominator of the current provincial rules, or a high water mark, remains to be seen.

Steven Richardson, MA, BA (Hons.), a Researcher at Nordicity focussing on a broad range of telecommunications and broadcasting issues, also contributed to this article.

15 Comments of Saskatchewan Telecommunications (2 May 2012), TNC 2012-206, para. 18.

16 Comments of the *Ministère de la Culture, des Communications et de la Condition féminine, Gouvernement du Québec* (2 May 2012), TNC 2012-206, para. 4 (translation).

17 <http://www.crtc.gc.ca/eng/publications/reports/policymonitoring/2012/cmr.htm>

18 Telecom Decision CRTC 2012-556, *Decision on whether the conditions in the mobile wireless market have changed sufficiently to warrant Commission intervention with respect to mobile wireless services* (11 October 2012).

19 Telecom Notice of Consultation CRTC 2012-557, *Proceeding to establish a mandatory code for mobile wireless services* (11 October 2012).

20 See: <http://cellphonehorrorstory.ca/>