



February 1, 2021

Consumer Protection Act Review
Manager, Consumer Policy Unit
Ministry of Government and Consumer Services
56 Wellesley Street West – 6th Floor
Toronto, ON M7A 1C1

Via Email: consumerpolicy@ontario.ca

RE: Consumer Protection Act Review

To Whom it May Concern:

1. The Canadian Wireless Telecommunications Associations is the recognized authority on wireless issues, developments and trends in Canada. Its membership is comprised of companies that provide services and products across the wireless industry, including wireless carriers and manufacturers of wireless equipment.
2. We are writing you with respect to the Ontario Government's consultation on improving the Consumer Protection Act (CPA). While the objective of improving the CPA is laudable, CWTA has concerns regarding certain proposals, including items in that are already addressed by the Canadian Radio-television Commission's (CRTC) Codes covering wireless, internet and television services. To the extent that there is any inconsistency between CWTA's submission and that of a CWTA member in this proceeding, in regards to the position of such CWTA member, the member's submission shall prevail.

CRTC Codes

3. While CWTA represents members of the wireless industry in Canada, some of our members also provide internet and/or television services. While our discussion of the government's proposals below is in the context of wireless services contracts, we note that most of the items identified as being covered by the Wireless Code¹ (the Code) are also addressed by the Internet Code² and the Television Service Provider Code³ in the context of internet and television services. As such, we also ask the government to also consider these comments in the context of contracts for those other services.
4. As the government consultation paper acknowledges, existing federal CRTC regulations are in place that govern agreements between consumers and providers of telecommunications services, including wireless service providers. In 2013, the CRTC enacted the Code, with the purpose of making it easier for consumers to understand their wireless service contracts, establish consumer-friendly business practices for the wireless services industry, and contribute to a more dynamic wireless market.

¹ <http://crtc.gc.ca/eng/phone/mobile/codesimpl.htm>

² <https://crtc.gc.ca/eng/internet/code.htm>

³ <https://crtc.gc.ca/eng/television/services/codesimpl.htm>

5. The Code applies to contracts between a service provider and an individual for the provision of wireless services, and includes, without limitation, regulations concerning the clarity of contracts, changes to contract terms and conditions, bill management, contract cancellation and extension.
6. The Code was the result of a lengthy comprehensive consultation process involving over 5,000 participants, including consumer advocacy groups, service providers, academia, hundreds of individual Canadians, the Ontario government and other provincial and territorial governments, and federal government agencies. Since its inception, it has been subject to multiple reviews and the CRTC has issued amendments and clarifications to ensure that the Code addresses new issues and any ambiguities are resolved.⁴

The Need for Consistency Across Canada

7. During the consultation process for the Code, the issue of potential conflicts between the Code and provincial consumer protection laws was a key topic of discussion. Most participants expressed the need for a national standard consistently applied across Canada. For example, in its submission to the CRTC, the Government of Alberta advocated for one national standard:

6. The Code should be applied consistently across Canada: While recognizing that provinces and territories have a capacity and a responsibility to implement consumer protection measures, interveners in Telecom Notice of consultation CRTC2012-206 called for a single set of standards for certain aspects of retail wireless service contracts across Canada, in order to avoid consumer confusion, as well as increased compliance costs and inefficiencies for the industry⁵.

8. During its appearance at the public hearings before the CRTC, the Government of Alberta further stated:

“I think it’s obvious that having 10 provinces with varying legislation could be a regulatory nightmare for consumers and wireless service providers. A national solution is really the only way to go on this. It will really ensure consistency across all provinces and territories and best serve consumers and service providers (...) As someone who is advocating for Alberta consumers, current and future, a national Code is the most appropriate solution to address the challenges many are experiencing”⁶.

9. The CRTC agreed and in its original Code determined that the Code would apply to all Canadian consumers of wireless services equally, regardless of any consumer protection legislation in force in the provinces or territories. Further it stated that the Code should take precedence over valid provincial laws in the cases of direct conflict.
10. In deference to the Code, Nova Scotia, which had provisions in its consumer protection legislation dealing with wireless service contracts prior to the Code, repealed such provisions after the Code became applicable to all wireless service contracts with individuals and small businesses. In addition, the Manitoba government has proposed legislation that will repeal its *Cell Phone Contracts Regulation*.⁷
11. Of especial relevance to this consultation, in October 2019, the Ontario government repealed the *Wireless Services Agreement Act, 2013*⁸, a law that was specifically designed, in the context of wireless services

⁴ <https://crtc.gc.ca/eng/phone/mobile/decisions.htm>

⁵ <https://services.crtc.gc.ca/pub/DocWebBroker/OpenDocument.aspx?DMID=1812575>

⁶ <https://services.crtc.gc.ca/pub/DocWebBroker/OpenDocument.aspx?DMID=1844949>

⁷ <https://web2.gov.mb.ca/bills/42-3/b030e.php>

⁸ <https://www.ontario.ca/page/consumer-protection-rules-wireless-service-providers>

contracts, to address matters touched upon in this consultation, such as clarity of contract and changing contract terms. When asked to comment on the reason for repealing this legislation, a spokesperson for the then Minister of Government and Consumer Services stated:

“By repealing it, we are harmonizing with federal regulations, which have made the original provincial Act redundant,” Woolley said. “Repealing the provincial Wireless Services Agreements Act frees businesses from burdensome duplicate regulations and provides consumers with clarity on their wireless service rights.”⁹

12. The arguments made before the CRTC and the above 2019 statement from the Ontario government hold true today. Consistency across Canada is in the best interests of consumers and service providers. Inconsistency creates confusion for consumers, inefficiencies and increased compliance costs.
13. Furthermore, the imposition of one set of rules across the country has unquestionably yielded results. In its 2017 review of the legislation, the CRTC concluded that the Code is on its way to achieving its objectives. Specifically, since the Code was introduced¹⁰:
 - Wireless complaints have decreased;
 - Bill shock has decreased;
 - Unilateral changes to contract terms have decreased; and
 - Ease of switching providers has increased.
14. While we do not dispute the Ontario government’s authority to enact legislation in the area of consumer protection, the government should not impose obligations on federally-regulated telecommunications service providers that are inconsistent with those found in the CRTC codes. As the Ontario government has previously acknowledged, having a provincial set of regulations that are duplicative and in some cases inconsistent with federal regulations that apply across the country does not serve the best interests of Ontarians.
15. In light of the above, set out below are our responses to proposals 1, 2, 3, 4 and 11 of the consultation paper. For proposals not referenced we have no comment at this time.

Proposal #1: Combine written contract disclosure rules for internet, remote and future performance agreements into a single set of core rules to apply except where there is a demonstrated need for more specific disclosure requirements.

16. Wireless service agreements should be exempt from contract disclosure rules under the CPA. Absent such exemption, the CPA should be amended to expressly state that in the event of a conflict between the CPA and any of the Code, the latter shall take precedence.
17. The Code sets forth detailed obligations regarding contract clarity and disclosure that are specifically tailored to address the key elements of a wireless service agreement. These include an obligation to use plain language, clearly set out key provisions, and provide a critical information summary that describes the most important elements of the contract. The Code further requires service providers to alert subscribers when they have entered jurisdictions where additional fees, such as roaming fees, apply.

⁹ <https://bit.ly/3qK5jEH>

¹⁰ <https://crtc.gc.ca/eng/archive/2017/2017-200.htm>

18. While CWTA is in favour of providing greater clarity to the rights and obligations of consumers and businesses, it is important to have one set of harmonized set of regulations across the country regarding agreements for wireless services. This not only lessens the compliance costs for businesses, it also provides consumers with clarity regarding their rights. Having both provincial and federal contract disclosure rules for wireless service agreements does not provide clarity, benefit consumers or reduce the operational burden for businesses.

Proposal #2(a): The only way to change a consumer contract should be if:

- **The consumer expressly consents, in writing if the initial contract needed written consent; or**
 - **The business sends advance notice of the change and:**
 - **The contract is one which the consumer can cancel at any time and without termination costs; or**
 - **The change(s) do not increase the consumer’s obligations or reduce the business’s obligations (e.g., disclosing changes in business contact information).**
19. Due to the potential for conflict between proposal 2(a) and the Code, wireless service agreements should be exempted from any provisions of the CPA dealing with changes to contracts. Absent such exemption, it is important that the limitations on changes to contracts be consistent with Section D of the Code, including the duration of notice periods and the express recognition that, in the case of wireless service agreements, the express requirements for changes that “increase the consumer’s obligations or reduce the business’ obligations” are limited to the “key terms” as defined in the Code during the fixed-term service commitment period. Failing that, the CPA should expressly state that in the event of a conflict between the CPA and the Code, the Code takes precedence.
20. Section D of the Code provides that, in the case of a postpaid wireless contract, the service provider cannot, during the fixed- term of the contract, unilaterally change any of the enumerated “key terms”, such as services to be provided, data allowance, minimum monthly charges, and cancellation fees, without informed and express consent. The consumer is entitled to refuse such a change. An exception to the consent requirement is if the change benefits the consumer by either reducing the rate for a single service or increasing the customer’s usage allowance for a single service. Any other term of the contract can be changed provided the account holder is given at least 30 calendar days’ notice before making such changes.
21. Section D of Code is specifically designed to strike the appropriate balance between providing consumers with certainty regarding material elements of a services agreement and giving service providers the flexibility to make necessary non-material amendments to service agreements upon advance notice. While the above proposal 2(a) has similarities to Section D of the Code, they are not the same. In particular, the Code expressly defines what are considered “key terms” that cannot be amended without consent. Furthermore, while the Code stipulates that consumers should receive advance notice of changes to non-key terms, it recognizes that service providers should be able to amend non-key terms without giving the customer the right to terminate the contract. This balance was carefully considered and tailored to both protect consumers and allow service providers to make some changes to contracts without impacting the commitment period of a fixed-term contract.
22. While proposal 2(a) also allows for a change to terms upon advance notice, and without consent, if the changes do not result in an “increase to the consumer’s obligations or reduction in the business’ obligations”, it leaves room for uncertainty as to whether a specific change to a contract will result in an increase to the consumer’s obligations or reduce the business’ obligations. For example, it is not clear if an increase to the price of an optional or pay-per-use service is an “increase to the consumer’s obligations”,

23. While the Code requires service agreements to set out the minimum monthly charge for the services in the contract as well as the price for any optional services selected by the customer at the time of entering into the contract, it does not require the contract to contain the prices for other optional services or pay-per-use services. Instead it need only indicate where the customer can find prices for these services.
24. This distinction is important as the prices for some optional and pay-per-use services, such as roaming or long-distance call fees, can change during the course of a fixed-term contract, and these changes are not ones for which the CRTC requires advance notice or customer consent. Instead, after careful consideration and consultation, the CRTC determined that advance notice is not required and that advising customers where they can find information for the then-current prices of optional and pay-per-use services strikes the appropriate balance between consumer protection and the practicalities of providing wireless services.
25. Requiring wireless service providers, as proposal 2(a) suggests, to contact customers whenever there is an increase in the rate for a long-distance call to one of over a hundred countries, or some other optional or pay-per-use service is unreasonable, and giving customers the right to terminate their fixed-term agreement because of an increase to an optional or pay-per-service that they may, or may not, use is inequitable. Unlike proposal 2(a), the Code provides clarity for both consumers and businesses on the issue of changes to wireless services agreements.

Proposal #2(b): Automatic contract renewal should only be possible if the consumer then has an ongoing ability to cancel at no cost from that time onward.

Contract renewal could be either by express consent, in writing if the initial contract needed written consent, or by a renewal process that includes advance notice to the consumer and renews the contract into an indefinite term (e.g., month-to-month or a shorter period) with no termination costs.

26. Wireless service agreements should be exempted from provisions in the CPA regarding the extension of contracts. Absent such exemption, the CPA should expressly state that in the event of conflict between the CPA and the Code, the Code prevails.
27. Section G6 of the Code contains detailed provisions governing the extension of wireless service agreements. While proposal 2(b) does not appear to conflict with the provisions of Section G6 of the Code, there remains concern that the drafting of such proposal into legislation could introduce inconsistencies or create uncertainty. As stated above, and as affirmed by the Ontario government when it repealed the *Wireless Services Agreement Act*, having duplicate layers of legislation governing the same subject matter creates unnecessary burdens on business and confusion for consumers.

Proposal #2(c): If adopted, these rules would apply to all contracts entered into after the rules come into force and to existing contracts one year after the in-force date (e.g., a subscription to a service entered into before the law is changed could not be amended or renewed without either clear consent or adopting a cost-free termination right after one year following the in force date of the new law).

28. For the reasons stated above, any provisions dealing with change in contract terms or contract extension should not apply to wireless service agreements. The Code addresses these issues in a manner that is specifically tailored to the unique character of wireless service agreements. As such, proposal 2(c) should have no application to wireless service agreements. If, despite the representations set out above, the government decides that some or all of proposal 2 should apply to wireless service agreements, it should only apply to contracts that are entered into after the in-force date of the new regulations. Most fixed-term agreements in the wireless industry are two years in duration and applying new rules to contracts entered into prior to the in-force date, but with only one year or less remaining in the fixed term, would create undue operational burden on service providers.

Proposal #3: Allow price changes under contracts only if the consumer explicitly consents to them as amendments to the contract (in writing if the initial contract needed written consent) or if the contract also gives the consumer a right to cancel cost-free at any time.

29. CWTA does not agree with proposal 3. As a proposal of general application, proposal 3 does not take into consideration the way that wireless services are sold, including the distinction between base services versus services that are offered on an optional, out-of-bundle or pay-per-use basis.
30. As indicated in our response to proposal 2(a) above, Section D of the Code contains prohibitions on changes to key terms in post-paid, fixed term wireless services agreements (i.e. contracts that have a commitment period) without obtaining the consumer's express consent in advance. Key terms that cannot be changed without the consumer's consent include the minimum monthly charge agreed to by the consumer as well as the price of optional services selected by the customer at the time of entering into the contract. However, fees for optional services, out-of-bundle or pay-per-use services, such as roaming fees and long-distance rates do not have to be included in the contract. Instead, the contract must only include information on where the customer can find the then-current rate for those services, and the Code does not require that a customer be given the right to terminate their contract as a result of any changes to these rates.
31. While the Code allows for the prices of some services to be changed during the contract term without consent or without the right to terminate, it requires other mechanisms to protect customers from incurring unintended charges for these services. For example, when a device is roaming in another country, the service provider must notify the customer that they are roaming and clearly explain any associated rates for voice, text and data services. Service providers must also suspend national and international roaming services in any billing period if the charges for such services reach the specified cap, and can only continue to provide such roaming services with the express consent of the consumer.
32. The Code carefully balances the need for consumers to have certainty regarding the cost of base services while providing service providers the flexibility they require to adjust the cost of optional, out-of-bundle and pay-per-use services upon advance notice. Proposal 3 does not respect this balance and conflicts with the Code.
33. Removing this flexibility with respect to pricing for optional, out-of-bundle and pay-per-use services would require service providers to develop different pricing practices for Ontario versus other provinces. If service providers are unable to adjust these prices to reflect their changing cost and pricing structures, the fixed prices paid by Ontarians for optional, out-of-bundle and pay-per-use services may end up being higher than the variable rates payable by consumers in other provinces.
34. In addition, while it may not be the intent of proposal 3, as drafted proposal 3 could be interpreted to mean that even if the contract entered into by the customer clearly states that the price will increase after a specified period of time of a fixed term, such price increase would not be enforceable unless agreed to in a subsequent amendment or if the contract gives the customer the right to terminate the agreement as of the date of the price increase. Clearly, businesses should be able to provide offers that provide for a lower rate for a given period of time with a higher rate going into effect a later date, so long as the price increase is clearly stated in the contract. For example, the Code requires that such price escalation be clearly set out not only in the contract but in the critical information summary that must be delivered to the customer.
35. For these reasons, and for the reasons previously stated regarding the need for one set of regulations governing wireless service contracts, if the Ontario government were to implement proposal 3, it should expressly exempt application to wireless service agreements. In the absence of such exemption, the CPA should expressly state that in the event of a conflict between the CPA and the Code, the Code is paramount.

Proposal #4(a): Add more examples of expressly forbidden misleading practices such as false claims of government oversight or other licensing and false prize claims as unfair practices.

36. CWTA does not oppose efforts to make it easier for consumers and businesses understand what are considered misleading practices. The examples of false claims of government oversight or other licensing and false prize claims are appropriate additional examples. We reserve comment on any additional examples that may be proposed.

Proposal #4(b): Strengthen the banning of unconscionable practices by explicitly prohibiting certain specific practices such as price gouging.

37. CWTA agrees that businesses should not engage in unconscionable practices. With respect to listing specific practices that would be considered unconscionable, we would need to see the proposed list before commenting.

Proposal #11: Forbid contract terms that limit the dollar value of claims for breach of implied warranties and conditions.

38. CWTA does not agree with this proposal. While the discussion paper states that the proposal is “is not about exposing businesses to increased or unlimited liability” that is exactly what it will do if implemented.
39. Section 9(1) of the CPA imposes an implied warranty that services “are of a reasonably acceptable quality.” While this may be a simple measure for the provision of some services, the quality of wireless services is conditional upon many factors that are outside the control of the service provider, including, without limitation, physical obstructions, geography, environmental conditions, distances between antennas and devices, interference from other wireless services, signal sharing, spectrum capacity limits, network loads, and end user device specifications and compatibility. In addition, as mobile wireless services are designed to be used while on the move, the impact of these outside factors will constantly change and, at any given time, the quality of service received by wireless subscribers will vary.
40. Removing service providers’ ability to limit their liability with respect to implied warranties and conditions greatly increases their potential liability and will result in an increase in the cost of doing business. Without such a limitation, service providers may have no option but to increase service fees for consumers to account for these increased expenses. It is also possible that some service providers, in an effort to limit potential liability, will elect to stop providing services in areas that are particularly hard to service and where the quality of wireless services varies greatly as a result of outside factors such as those listed above.

Proposal #14: The CPA would provide that if a consumer is required to sue a business for its failure to refund money as required under the CPA, the amount that the consumer can claim in such an action would be three times the amount of the required refund that the consumer has not received.

41. CWTA does not agree with this proposal. Increasing the amount that a consumer may claim for a refund claim does not give a consumer of wireless services any greater potential compensation that is currently available. It may also have the unintended effect of diverting consumer complaints from the independent agency established by the federal government to deal with customer complaints to the already overcrowded provincial court system.

42. In 2007, the federal government ordered the CRTC to create an independent, industry-funded agency to resolve complaints from consumers and small business retail telecom consumer. The resulting agency, the Commission for Complaints for Telecom-television Services (CCTS), investigates and attempts to resolve consumer complaints at no charge to the consumer. For unresolved complaints, the CCTS can impose a wide-array of remedies, including requiring a service provider to provide a customer with monetary compensation that is not subject to any limitations of liability contained in the service agreement.
43. The CCTS also publishes an annual and mid-year report of complaints, which includes identifying the number of complaints made against named service providers. The knowledge that the number of complaints against it will be published, together with the potential of having to pay compensation if found at fault, act as deterrents to wrongful behaviour and motivate service providers to resolve issues with customers even if the service provider is not clearly at fault.
44. The CCTS was established to provide consumers with an efficient and less-costly alternative to pursuing their complaint in court. It also helps lessen the burden on the province's court system. Increasing the amount that a consumer may claim for a refund claim does not give the consumer any greater potential compensation than pursuing their complaint through the CCTS. However, it may unintentionally drive more complaints to the court system. This would not benefit the consumer, taxpayers or service providers.
45. In addition to the CCTS resolution process, the CPA includes administrative monetary penalties that may be levied against a business if it fails to comply with its obligations under the Act, including refund obligations. Section 100(3) of the CPA also permits a court to order "exemplary or punitive damages or such other relief as the court considers proper.

Other Comments

46. Many of the proposals cited above, if enacted, would require operational and computer systems changes for service providers. This operational burden would be greatly increased if changes are required to the millions of existing customer contracts. As such, a transition period of no less than twelve months from the in-force date would be required to enable service providers to make the necessary changes to their contracts, operational processes and computer systems.

Conclusion

47. Consumers of wireless services are best served by consumer protection legislation that is consistent across the country. Therefore, we respectfully ask that the suggestions in this response be implemented to eliminate any conflicts and promote consistency between the CPA and the Code.

Thank you for the opportunity to provide our comments with respect to this consultation. Should you have any questions regarding our response, please do not hesitate to contact the undersigned.

Sincerely,

[Original signed by Eric Smith]

Eric Smith
Senior Vice President