



Comments Concerning Bill C-276:
An Act to Amend the Competition Act

Submitted to
The Standing Committee on Industry

December 8, 1999

Executive Summary

The Canadian Wireless Telecommunications Association (CWTA) is the voice of the wireless telecommunications industry in Canada. Our members offer an array of productivity enabling services to Canadians including cellular and PCS, mobile radio, paging and mobile satellite services.

Bill C-276 will make it a matter of reviewable conduct for, among others, a Canadian telecommunications carrier to charge payment for a new service, unless certain requirements have been met. Wireless telecommunications carriers meet the definition of Canadian carriers and, as such, would be subject to the requirements of C-276.

It is our understanding that the intent of Bill C-276 is to ensure that federally regulated firms receive the express consent of the client for the purchase or reception of a new service by the client. It is also our understanding that the notification requirement inherent in the Bill is only intended to apply in cases where a firm uses negative option marketing to sell a new service.

However, based upon the CWTA's review of the Bill inclusive of the proposed amendments tabled by Mr. Roger Gallaway on November 15, 1999, the current draft wording of the Bill indicates that it would apply to all new services regardless of how they are marketed.

If the CWTA is correct that it is intended that the Bill only apply in situations where negative option marketing is used, then we respectfully submit that changes to the Bill are required. Specifically, the Bill needs to provide for exception where express consent of the client has been received. This could be provided for under a revised Section 74.051 (4) that deals with exceptions.

Moreover, express consent needs to be defined as including consent in writing, orally or by electronic means.

In addition, the CWTA believes it would be useful to expand the exemption provided in Section 128 (1.1) so that it provides for a "public interest" exemption.

In this regard, the CWTA notes that Clause 4, Section 128 (1.2), provides for the Minister of Canadian Heritage to recommend to the Governor in Council that certain services be exempted in order to achieve objectives set out in the *Broadcasting Act*. It is also recommended that a new clause be added in Section 128 affording the Minister of Industry the opportunity to recommend to the Governor in Council that certain services be exempted in order to achieve the objectives set out in the *Telecommunications Act* and the *Radiocommunication Act*.

If the changes above were accepted, then the CWTA would have no reservation in endorsing the Bill, assuming that C-276 would only apply in situations where negative option marketing is used and assuming that Mr. Gallaway's proposed changes are also accepted.

If, on the other hand, the CWTA is incorrect and it is indeed the intent to apply Bill C-276 to all new services (regardless of how they are marketed), then we would have serious concerns regarding the Bill. These concerns are outlined in our detailed submission.

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Introduction

The Canadian Wireless Telecommunications Association (CWTA) is the voice of the wireless telecommunications industry in Canada. Our members offer an array of productivity enabling services to Canadians including cellular and PCS, mobile radio, paging and mobile satellite services. Wireless telecommunications is an integral component of the new economy – delivering real-time information anywhere, anytime. Broadband wireless telecommunications will be a principal driver of the new economy as Canada enters the new millennium.

The wireless telecommunications industry has contributed significantly in enhancing the productivity of Canadian businesses and individuals through the introduction of ubiquitous low-cost mobile communications. Mobile communications have become an essential element for Canadian business productivity and international competitiveness.

Today, you can receive a call on your mobile satellite phone anywhere in the world or receive a message on your satellite pager. Cellular and PCS phones are commonplace with a penetration rate in Canada of more than 20 per cent. Newly emerging technologies will provide businesses with mobile data capability enabling an abundance of new productivity offerings from information services such as stock market trading and banking, to telemetry applications and mobile point-of-sale terminals. High-speed mobile access will provide a new dimension to the Internet including accessing e-mails on the go as well as facilitating the growth of electronic commerce. With the introduction of fixed broadband wireless networks offering high-speed access, Canadians can enjoy wide-band communications – voice, data and access to the Internet. A worldwide explosion in these services is occurring and Canadian firms continue to be at the forefront of innovation providing global leadership.

Canada is extremely well served by its wireless communications industry. With five major carriers providing service, mobile telephony reaches 94% of the Canadian population – a tremendous achievement given our vast geography and sparse population.

Bill C-276

For the purposes of this submission, where the CWTA refers to Bill C-276 it is referring to the Bill inclusive of the amendments introduced by Mr. Roger Gallaway on November 15, 1999.

Bill C-276 will make it a matter of reviewable conduct (i.e. a civil reviewable matter under the misleading advertising and deceptive marketing practices section of the *Competition Act*) for, among others, a Canadian telecommunications carrier to charge payment for a new service, unless certain requirements have been met. Wireless telecommunications carriers meet the definition of Canadian carriers and, as such, would be subject to the requirements of C-276.

C-276, if passed in its current form, would require that wireless telecommunications carriers provide customers, before charging payment for a new service, a notice for at least three consecutive months containing:

- A description of the new service;
- The date the new service is to begin;
- The cost of the new service calculated monthly and annually;
- A statement that the new service is not mandatory;
- A statement that the client may obtain the new service by signing a business reply card and sending it to the enterprise;
- Any other matter that may be prescribed (in regulations).

Wireless carriers would also be required to subsequently receive the express consent of the client for the purchase or reception of the new service – unless the following conditions are met:

- The new service replaces another service for which the client has already paid a fee and the same fee or a lesser fee is charged to the client.
- The new service is not the subject of a separate and specific fee.
- The enterprise is required by law to provide or sell the new service and is authorized to charge a fee to the client for that service.

None of the above requirements apply if the wireless carrier receives from the client a waiver of the notice requirement.

The Governor in Council can also exempt services by regulation and after public consultation in the following circumstances:

- Any service, other than a licensed service distributed on a broadcasting undertaking, to allow enterprises subject to the *Act* to remain competitive in their sector of activity, provided the exemption does not deprive consumers of their right to competitive prices and product choices.
- Any licensed service distributed on a broadcasting undertaking, on the recommendation of the Heritage Minister, and upon consultation with the CRTC, that should be exempted to achieve the objectives of the *Broadcasting Act*.

Issues of Concern

Intent and Applicability of Bill C-276

It is our understanding that the intent of Bill C-276 is to ensure that federally regulated firms receive the express consent of the client for the purchase or reception of a new service by the client. It is also our understanding that the notification requirement inherent in the Bill is only intended to apply in cases where a firm uses negative option marketing to sell a new service.

However, based upon the CWTA's review of the Bill inclusive of the proposed amendments tabled by Mr. Roger Gallaway on November 15, 1999, the current draft wording of the Bill indicates that it would apply to all new services regardless of how they are marketed.

If the CWTA is correct that it is intended that the Bill only apply in situations where negative option marketing is used, then we respectfully submit that changes to the Bill are required. Specifically, the Bill needs to provide for exception where express consent of the client has been received. This could be provided for under a revised Section 74.051 (4) that deals with exceptions.

Moreover, express consent needs to be defined as including consent in writing, orally or by electronic means.

In addition, the CWTA believes it would be useful to expand the exemption provided in Section 128 (1.1) so that it provides for a "public interest" exemption.

In this regard, the CWTA notes that Clause 4, Section 128 (1.2), provides for the Minister of Canadian Heritage to recommend to the Governor in Council that certain services be exempted in order to achieve objectives set out in the *Broadcasting Act*. It is also recommended that a new clause be added in Section 128 affording the Minister of Industry the opportunity to recommend to the Governor in Council that certain services be exempted in order to achieve the objectives set out in the *Telecommunications Act* and the *Radiocommunication Act*.

If the changes above were accepted, then the CWTA would have no reservation endorsing the Bill, assuming that C-276 would only apply in situations where negative option marketing is used and assuming that Mr. Gallaway's proposed changes are also accepted.

If, on the other hand, the CWTA is incorrect and it is indeed the intent to apply Bill C-276 to all new services (regardless of how they are marketed), then we would have serious concerns regarding the Bill. These concerns are outlined below.

General Concerns with the Broad Applicability of the Bill

Bill C-276, if passed as currently drafted inclusive of the proposed amendments tabled by Mr. Gallaway, will introduce serious, costly impediments to business and consumers. The Bill is very broadly worded and does not clearly identify the specific conduct (negative option marketing), which is targeted

There is also an apparent focus in the Bill on *paper* means for notification and consent. This aspect of the bill ignores the speed of the e-commerce economy and appears to be contrary to the Canadian government's efforts to make Canada the most connected nation in the world. For example, one would hardly associate business reply cards with the Internet-based economy.

Given that wireless telecommunications carriers do not typically utilize paper as a means for interacting with their customers, the imposition of a paper notification regulation will place unwarranted costs on the industry. People are sold goods and services over the phone, through the Internet and in a variety of other ways. Mailing a business reply card is simply an old fashioned way of doing business and, as long as the client has given express consent in *any* form, there is no negative optioning.

Moreover, to require firms to continue notifying customers of new services or charges after the customer has given consent to receive the new service will lead to customer annoyance and frustration with commercial transactions. One group of clients in particular, business customers, are hardly in need of this type of consumer protection. For example, it hardly seems reasonable to expect wireless carriers to mail business reply cards to obtain consent from the telecommunications manager at a major bank every time the manager decides to add a new phone or service to the bank's account! There are many examples of enhanced services that telecom managers can choose to add on to their accounts, such as voice mail, roadside assistance, voice activated dialling, information services and text messaging.

It is worth noting that the Bill as it is currently written introduces serious competitive inequities for wireless telecommunications carriers. A reseller of wireless services that is not a Canadian carrier, and most resellers are not Canadian carriers, will achieve a competitive and cost advantage over facilities-based carriers. C-276 does not apply to resellers although resellers compete with facilities-based carriers for the same customers. A reseller would be able to implement and realize price changes sooner than a facilities-based carrier, as well as avoid the additional costs associated with administering the notification and/or obtaining a waiver.

Below, the CWTA outlines some of its specific concerns with certain sections of Bill C-276, if it were to be applied to all new services (regardless of how they are marketed). These amendments concern the practical implementation of the Bill, not the principle of the Bill.

Definition of Client

The CWTA believes the current definition of “client” is unnecessarily broad:

*"client" means a person who receives a regular service from an enterprise in return for which the person pays the enterprise a fee periodically or according to the frequency with which the person uses the service.*¹

This definition would appear to capture business customers. The CWTA does not believe that business users are the intended targets of C-276. Moreover, business users tend to be sophisticated customers capable of making speedy decisions through a variety of media. The CWTA does not believe that business customers require repeated notices of new services or charges. For example, it hardly seems reasonable to expect wireless carriers to mail business reply cards to obtain consent from the telecommunications manager at a major bank every time the manager decides to add a new phone or service to the bank’s account!

The CWTA recommends that the definition be modified such that client includes only residential consumers, not businesses.

Regular Services

Within the definition of “client” noted above, reference is made to “regular service”.

The CWTA finds this terminology confusing. It is not clear what is meant by “regular service”. It is recommended that the provision be amended to clearly define the nature of services covered.

In particular, the CWTA would recommend that the definition exclude those types of services that are always “on” and which customers can activate or use at anytime for a fee. Examples of these services include conference calling and concierge services. These services can be activated on a per call basis for a fee, but would not *regularly* appear on a subscriber’s bill, unless of course the subscriber activates the service every month.

Notice Requirement

The Bill currently requires a three-month-long notification period.² The CWTA believes this requirement to be extremely burdensome. Simply put, the period is too long.

The three-month notification period will affect the speed at which new services can be brought to market. It also provides competitors with significant advance warning (three months) of the introduction of new products and services.

¹ Clause 1 of Section 74.051(1).

² Clause 1 of Section 74.051(2)(a).

Most importantly, the CWTA believes that the lengthy notification period will be an annoyance to customers. The repeated notifications will be viewed as unnecessary overkill advertising of new services. The annoyance will be especially acute to those customers who have consented to receive a new service.

In addition, the wording of the clause suggests that the notifications themselves will be distributed by mail (or at least on paper).³ This is troubling. The Bill would seem to ignore the modern manner of conducting business. Today in the wireless industry, many service orders are taken over the phone (with calls to customer service centres) and over the Internet.

Another concern of the CWTA relates to the apparent focus in the Bill on *paper* means for notification and consent. This aspect of the bill ignores the speed of the e-commerce economy and appears to be contrary to the Canadian government's efforts to make Canada the most connected nation in the world. For example, one would hardly associate business reply cards with the Internet-based economy.

Finally, and this point must not be minimized, a lengthy notification period, especially one involving printed material, will place a significant cost on the industry. This is especially true for industries, like the wireless telecommunications industry, where modern forms of communications are normally used to interact with customers.

The CWTA would recommend that the notification period be shortened to one month and that the prescribed format of the notice explicitly recognize the use of both phone and e-mail communications.

Obtaining Consent

The consent requirement, especially when combined with the three-month notice provision is overly burdensome.⁴ In particular, it ignores the ability of customers to consent to new services by using new technologies such as the Internet, and existing methods such as voice communications.

The current wording would require that customer notification continue for three months even if a customer had consented to receive a new service after one month. Again, this is something the CWTA believes will cause a good deal of customer annoyance. In fact, it is unlikely that a carrier would provide the service until after the three-month period expires because the carrier cannot receive payment of the service until the period expires.

³ This is especially true in light of the reference to a business reply card in Clause 1 of Section 74.051(2)(a)(v).

⁴ Clause 1 of Section 74.051(2)(a) and (b).

The CWTA would recommend amending the Bill by changing the word “and”, which appears between Clause 1 of Section 74.051(2)(a) and Clause 1 of Section 74.051(2)(b), to the word “or”.

Such a modification would recognize that negative option marketing does not occur once consent has been obtained for the customer. This would also avoid the situation described above where a customer wishes the service to be provided before the three-month notice period has expired. Finally, such a modification would be more consistent with the waiver of notice in section 74.051(4).

Client Waivers

The exception provided in section 74.051(4) is as follows:

Paragraph (2)(a) does not apply where the enterprise receives from the client a waiver of the notice requirement set out in that paragraph.

The CWTA believes the wording of the exception is too narrow and does not reflect how a “waiver of notice” is to be obtained.

It is recommended by the CWTA that the exception should apply in situations where the customer has requested the new service. The CWTA also recommends that the exception should apply in those instances where the customer has provided consent in writing, orally or in electronic format to receive the new service

Exemptions by Governor in Council

The CWTA submits that the exemption provided in Section 128 (1.1) is too narrow and does not provide for a “public interest” exemption.

In this regard, the CWTA notes that Clause 4, Section 128 (1.2), provides for the Minister of Canadian Heritage to recommend to the Governor in Council that certain services be exempted in order to achieve objectives set out in the *Broadcasting Act*.

It is recommended that a new clause be added in Section 128 affording the Minister of Industry the opportunity to recommend to the Governor in Council that certain services be exempted in order to achieve the objectives set out in the *Telecommunications Act* and the *Radiocommunication Act*.

Conclusion

The CWTA has outlined above amendments to Bill C-276 that will alleviate the concerns of the wireless telecommunications industry. We appreciate having the opportunity to express our views to the Committee.