

BARRIERS TO CHANGING Telecommunications Service Providers

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The masculine gender is used to facilitate reading.

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UNION DES CONSOMMATEURS, *Strength Through Networking*

Union des consommateurs is a non-profit organization whose membership is comprised of several ACEFs (*Associations coopératives d'économie familiale*), *l'Association des consommateurs pour la qualité dans la construction* (ACQC), as well as individual members.

Union des consommateurs' mission is to represent and defend the rights of consumers, with particular emphasis on the interests of low-income households. Union des consommateurs' activities are based on values cherished by its members: solidarity, equity and social justice, as well as the objective of enhancing consumers' living conditions in economic, social, political and environmental terms.

Union des consommateurs' structure enables it to maintain a broad vision of consumer issues even as it develops in-depth expertise in certain programming sectors, particularly via its research efforts on the emerging issues confronting consumers. Its activities, which are nation-wide in scope, are enriched and legitimated by its field work and the deep roots of its member associations in the community.

Union des consommateurs acts mainly at the national level, by representing the interests of consumers before political, regulatory or legal authorities or in public forums. Its priority issues, in terms of research, action and advocacy, include the following: family budgets and indebtedness, energy, telephone services, radio broadcasting, cable television and the Internet, public health, food and biotechnologies, financial products and services, business practices, and social and fiscal policy.

Union des consommateurs works in collaboration with several consumers groups in English Canada and abroad. It is a member of Consumers International (CI), a United Nations recognized organization.

PREAMBLE

Breaking the Chains: Barriers to Consumer Migration in the Canadian Telecommunications Market

Whereas [...] retail local exchange services [...] will be subject to competition that is sufficient to protect the interests of users and will not unduly impair the establishment or continuance of a competitive market...¹

At the same time we recognize that in competitive markets, there may be an increased need for effective consumer protection.²

¹ *Order Varying Telecom Decision CRTC 2006-15, S.O.R./2007-71, 4 April 2007, last whereas clause.*

² Office of Communications (Ofcom). *Ofcom review of additional charges including non-direct debit charges and early termination charges*. London, Ofcom, February 28, 2008. 117 p. (Hereinafter "Ofcom-review"). P. 11. Ofcom, a successor of Oftel, among others, now regulates telecommunications, notably. This report is available at www.ofcom.org.uk/consult/condocs/addcharges/addcharges.pdf.

I- INTRODUCTION

A - The Consumer: Loyal or Prisoner?

Can the fate of consumers be entrusted solely to market forces, or should legislators intervene to protect consumers? These alternatives remain at the heart of public policy debates about communications in Canada and elsewhere.

To benefit from the market, consumers must have the freedom to choose. But that freedom can be hindered to the point that the ability to choose is practically destroyed. Surely, the fact of such obstacles and their effects should weigh on public policy choices when market operation is the problem.

The telecommunications sector favours long-term relations over timely ones: we may use a phone booth sometimes, but we'll make sure to have a subscription with a telephone service provider. Is it easy for a customer to opt for another provider during or at the end of his contractual relation, or is he captive, and if so how and to what extent? If he maintains his current relation rather than migrate toward another provider, is it by choice or coercion?

If barriers exist to changing telecommunications service providers, what are they and should we be concerned?

The four (4) following issues will be considered here systematically:

- what types of phenomena can obstruct the migration of consumers from one provider to another in the telecommunications service markets?
- do we observe those phenomena in Canadian markets?
- what types of mechanisms can counter those obstacles?
- what work has been done in other jurisdictions to identify those phenomena and establish mechanisms to counter them?

A review and classification of the types of phenomena that can constitute barriers to consumer migration is required first. To that end, we will examine certain foreign experiences and classify existing solutions, which usually correspond to difficulties that are at least apprehended.

Thus equipped with an adequate analytic framework, we will observe that the Canadian telecommunications service markets we're interested in are indeed littered with obstacles to consumer mobility, and that those obstacles can significantly hinder consumer migration and the adequate operation of telecommunications markets. An examination of market practices and consumers' complaints or comments will yield convincing indications.

We will also evaluate the effectiveness of measures that already exist in Canada, and then we will consider the outlines of what measures might be added.

B - The Field of Study

We will focus here on the means of communication used by consumers, physical persons, for non-business purposes. Accordingly, company and wholesale services are excluded from our study.

We will examine the following services: local wired telephone service, mobile telephone service, and Internet access. With regard to Internet access, low-speed (dial-up) access is being marginalized in the market, so we will concentrate on the more significant niche of high-speed access.

We will mainly study three provincial markets: Quebec, Ontario and Saskatchewan. Quebec and Ontario are the two most populous markets in Canada³, those where competition is likely to be most ferocious. Saskatchewan stands out because there, telecommunications services are largely provided by a public corporation that retains a considerable market share whose main competition is a cooperative. We found it interesting to inquire whether the practices of such a provider differ from those of private companies engaged in strenuous competition.

Although none of these three provinces has a homogenous market, since providers and their offers can vary by region, our study focuses on major centres, a few rural areas, and the practices of major providers and a few representative regional competitors.

Moreover, we could not study each offer made by service providers; their offers and related variations are amazingly varied⁴. In fact, we will examine the obstacle that such complexity constitutes in itself in requiring consumers to make major efforts if they want to understand the market. We've chosen a sample of offers that will suffice to illustrate the magnitude of that difficulty and its possible consequences.

C - Terminological Choices

In the following pages:

- “wired telephony” means: telephone services requiring tangible support. These services are traditionally provided by licensees, and more recently by cable operators as well.
- “mobile telephony” means: what we usually call cell telephony, i.e., voice transmission by radio waves between a relay base and the user’s mobile telephone.
- “providers” means: companies that offer all or some of the telecommunications services in the markets we will analyse.

³ Statistics Canada estimated that the Canadian population in October 2007 was 33,091,228 persons. Ontario and Quebec numbered respectively 12,850,636 and 7,719,993, and Saskatchewan slightly over a million in October 2007, i.e., 3% of the Canadian population. Statistics Canada’s home page, consulted on February 16, 2008, at <http://www.statcan.ca/start.html>.

⁴ An example: Apart from long distance, the six monthly Mobile Telephony packages are offered by Fido in Montreal in 92 different combinations of terms, taking into account the various bonus offers. For instance, the “unlimited in-calls” package exists in versions that cost 25, 30, 35, 45 and \$65, with or without a “Fido agreement” and with bonus unlimited local calls for 2 or 3 months (depending on the contract’s term) and offers of additional minutes in some cases. Fido portal. Online: <http://www.fido.ca/portal/en/packages/longdistance.shtml> (consulted on March 15, 2008).

- “licensees” means: telecommunications service providers that hold or have held a territorial monopoly.
- “competitors” means: telecommunications service providers that confront former monopolies in markets now open to competition.

We will use the word “term” in its legal Civil Code meaning, i.e., the expiration of a period or, more generally, of a time limit. The word will particularly designate the expiry date of a contract of fixed duration.

If a given provider can offer a simple service under a monthly contract or one of longer duration, it can also offer the same service at a lower price in exchange for the consumer’s long-term commitment or by adding other services that may be complementary or ancillary. When features or options are added to a given service, we use the word “package” in this study, given that the terminologies of providers may vary. When different services are combined⁵, we use the word “bundle”.

It should be noted that the major groups offering telecommunications services are recognized by the public through well-known banners (Bell, Rogers, Telus...). Technically, their services are often provided by distinct affiliates or other legal entities. However, we have not generally used those distinctions, because consumers don’t and because the distinctions didn’t seem necessary to understanding market conditions, but would only uselessly complicate an understanding of the text.

D - Methodology

The study of competitive market conditions and legal frameworks in Canada, the United States, the United Kingdom and France was based on documentary research and the consultation of resource persons.

The practices of providers have been determined mainly by examining their Web sites, which often provide a dizzying quantity of information on their offers, including the general conditions governing their contractual relations with subscribers. This information was obtained or verified in February and March 2008. We limited ourselves to service offers intended for consumers. We also examined advertising documents distributed through the media and by mail, as well as documents addressed to subscribers in the context of their contractual relation. We counterchecked certain details by means of a very modest field survey.

The study of consumer perceptions has used two approaches that almost exclusively concern Quebec residents: consulting part of the complaints file of the Consumer Protection Bureau, and then using a poll conducted by Union des consommateurs among persons in its electronic mailing list.

Finally, we tried to obtain, through telephone interviews or an e-mail questionnaire, information on the perception of provincial government representatives and major providers. We deplore the fact that the representatives of two provinces and two companies essentially declined our invitation to dialogue or did not deign to answer us, despite our follow-ups.

⁵ Wired telephony, mobile telephony and Internet access, but also – although they are not part of this study – long distance calls and television service.

E - The Plan

After a brief overview, in Section II, of the advantages that competition is assumed to offer consumers, we discuss in Section III certain economic aspects of barriers to consumer migration from one provider to another. Migration requires a destination: the level of competition is thus a fundamental variable. We will also summarize the situation in other jurisdictions.

Section IV will address certain legal aspects: competition law, contract law and consumer law can play a role in the analysis and control of barriers to customer mobility. We will examine existing legal frameworks in Canada but also in the United States, France and the United Kingdom.

In Section V, we will study the situation in Canada. We will draw an inventory of the departure costs established by providers' business practices.

The last Section will contain our conclusions and a few recommendations.

II - THE BENEFITS OF COMPETITION

“The liberalisation of the European telecommunications market in 1998 has given individual users and companies the benefits of competition: more choice, better services, lower prices. The telecommunications is now contributing significantly to the economic growth of the Union.”⁶

In a 2006 decree giving the CRTC instructions to implement the Canadian telecommunications policy⁷, then in a 2007 decree amending a decision rendered by the CRTC⁸, the Governor in Council mentioned, as the reason for her intervention, the benefits a free market can provide consumers. The CRTC had concluded, in a decision thus amended, that market forces might disadvantage various clienteles, notably residential subscribers. Concerned about the risk that certain essential services would be eliminated or that their price would increase, the CRTC reserved the right to intervene in order to protect vulnerable clienteles⁹.

Our review of the literature explores the arguments in favor of competition in the sector of communications, and confirms a significant trend toward deregulation, advocated for its supposed benefits to the economy and consumers.

The benefits of competition to the consumer are said to be threefold: better prices, greater choice, and improved services. Beyond faith and ideology, we note that the objective arguments that those benefits will inevitably result from deregulation are rather weak. Those arguments can be summed up as the simple repetition that market deregulation alone would magically sprout robust competition compelling all the companies to put the consumer first.

⁶ Translation of excerpt from *Société de l'information: la commission européenne révolutionne le cadre légal*, **ETIENNE WERY**, July 2000: <http://www.droit-technologie.org/actuality-314/societe-de-l-information-la-commission-europeenne-revolutionne-le-ca.html>. Statement of commissioner Erki Liikanen, responsible for information society files.

⁷ *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, S.O.R./2006-355, registered on December 14, 2006

⁸ *Order Varying Telecom Decision CRTC 2006-15*, S.O.R./2007-71, April 4, 2007.

⁹ *Telecom Decision CRTC 2006-15*, Forbearance from the regulation of retail local exchange services.

A - Better Prices

Claims that competition leads to the best price for consumers are repeated tirelessly by all free-market advocates from the telecommunications sector. We hear the same claims from certain government organizations and international or community organizations.

The Competition Bureau of Canada, for example, declares that the public interest will be better served by competition than by regulation¹⁰. For its part, Consumers International, a worldwide group of consumer associations, writes in its *Consumer guide to competition: A practical handbook*, “The positive price effects of competition are enormously important. (...) An interest in driving prices down through competition is an interest shared by all consumers”¹¹.

The Organization for Economic Co-operation and Development (OECD) organized in 2002 a Conference on Telecommunications Policies for the Digital Economy, to convince member countries of the importance of deregulation reform by showing “*the impact of competition on the improvement of infrastructure and services, and improved performance of telecommunication operators in terms of technology, customer choice, prices and quality of service*”¹².

During that conference, Philip Sayer, head of public relations and communications with providers at the Reuters Ltd. news agency, which spends more than half a billion American dollars on telecommunications annually, notably explained that the lack of competition in the telecommunications sector had slowed down the development of its new agency for a long time; he stated that since the sector was deregulated, competition has made prices fall, improved services and brought new technologies to market¹³.

As an example: in tandem with increased competition in the British markets for more than twenty years, the cost incurred by a consumer for a typical service bundle decreased by nine percent (9%) from 2005 to 2006, and by thirty-eight percent (38%) from 2001 to 2006¹⁴. The popularity of bundles is said, however, to contribute strongly to this development.

¹⁰ “The Bureau believes that, to the extent possible, public policy should attempt to achieve social policy goals (e.g., universal service, quality of service, affordable telephone service, emergency services, and services for the disabled) through the adoption of mechanisms that are least restrictive to competition,” Telecommunications Policy Review Panel: - The Regulatory Framework, <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01973e.html>, point 90.

¹¹ *The Consumer guide to competition: A practical handbook*, Phil Evans, Consumers International, March 2003: http://72.14.205.104/search?q=cache:2KHNB24Q6PkJ:www.consumersinternational.org/shared_asp_files/uploadedfiles/A7177B91-A84B-460A-85EB-2E1F1452DD19_Doc768.pdf+%22The+Consumer+guide+to+competition:+A+practical+handbook&hl=en&ct=clnk&cd=7&gl=ca, p. 13.

¹² News release – OECD Global Conference on Telecommunications Policy for the Digital Economy: http://www.oecd.org/document/17/0,3343,en_2649_34223_2535505_1_1_1_1,00.html.

¹³ Talking telecoms, OECD Observer: http://www.oecdobserver.org/news/fullstory.php/aid/692/Talking_telecoms.html

¹⁴ Office of Communications (Ofcom). *Communications Market Report*. London, August 23, 2007. 337 p. (Hereinafter “Ofcom-CMR”). P. 255. The annual report evaluates all the sectors administered by Ofcom. Due to the document’s size, the pdf version of the 2007 report is divided into three blocks; the “telecoms” chapter is found at www.ofcom.org.uk/research/cm/cmr07/telecoms/telecoms.pdf.

B - Freedom of Choice and Improved Services

“Why would a monopoly provider bother to provide a better service when it knows it will not be punished if it does not?”, asks the *Consumer Guide to Competition*¹⁵ to illustrate the interest in having companies compete in order to improve the quality of service provided to consumers.

It is claimed that competition in telecommunications services gives consumers the power to choose between several options (mobile or fixed telephony, the Internet by satellite or cable, various long distance plans, etc.) and to choose between several companies. In theory, companies that want to share the clientele must multiply, in quantity and quality, the advantages and services offered to consumers, in order to attract or retain them. For the same reasons, companies will constantly try to develop new, more effective and attractive products.

Competition would also benefit the consumer by giving him another choice: to be able to benefit, or not, from innovations introduced by companies seeking to break consumer loyalty. The economist Pascal Salin speaks of competition as a “process of discovery”, an “essential factor of innovation and economic progress”¹⁶.

This question of technological innovation is one of the main arguments put forward by the Telecommunications Policy Review Panel, established by the Competition Bureau of Canada: “(...) *competition in telecom services is likely to stimulate research and development and encourage innovation in the field of telecommunications (...)*”¹⁷.

C - Indirect Benefits of Competition

In France, competition in the sector of telecommunications is reportedly a factor of growth for the economy, leading to decreased costs for companies, the creation of 15,000 direct jobs and a 100% increase in communications investments between 1997 and 2000¹⁸.

Consumers International declares that the constant need to satisfy consumers in the field of communications forces companies to improve their productivity and efficiency at all times, so as to stand out from the competition¹⁹.

The Competition Bureau of Canada mentions the substantial costs of maintaining a regulatory system, as well as the slowness of the process, which is likely to harm companies economically and in terms of innovation:

This is why regulation is imposed only in traditional utility sectors where one sees significant natural monopoly, consumers vulnerable to potential exploitation, and technology and demand sufficiently stable to make costs and price predictable. Even at its best, regulation is less likely to be effective the more rapidly technological

¹⁵ *Consumer Guide to Competition, op. cit.*

¹⁶ *Conférence de Cancun: les bienfaits du libre-échange*, Pascal Salin in *Le Québécois libre*, September 13, 2003: <http://www.quebecoislibre.org/030913-5.htm>.

¹⁷ *Telecommunications Policy Review Panel: - The Regulatory Framework:* <http://www.bureaudelaconcurrence.gc.ca/epic/site/cb-bc.nsf/fr/01973f.html>, point 39.

¹⁸) *Le bilan de la loi n° 96-659 de réglementation des télécommunications*, Pierre HÉRISSON, Senator, February 21, 2002: <http://www.senat.fr/rap/r01-273/r01-2730.html>.

¹⁹ *Consumer Guide to Competition, op. cit.*

advances change costs and service offerings. When the telecommunications sector consisted largely of relatively stable “plain old telephone service” supplied under clear natural monopoly conditions, the costs associated with delay may well have been worth incurring.²⁰

Free competition between companies would thus save governments time and money, by making it possible to attain the goals that regulations would seek: notably, to promote innovation and better protect consumers.

However, expectations of the benefits of deregulation and competition are related to economic models that, to meet those expectations, require perfect implementation, which is unfortunately possible only in the abstractions of those theoretical models. As we will see, certain realities and company practices often hinder the ideal operation of markets and belie the expectations of theorists.

²⁰ *Telecommunications Policy Review Panel:- The Regulatory Framework*, <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01973e.html>, point 46.

III - A FEW ECONOMIC CONSIDERATIONS

A - Market Operation

Economic activity plays a leading role in modern liberal societies. It is thus desirable that it operate well. Neo-classical economic theory postulates that perfectly competitive markets are the most effective and efficient form of economic organization²¹. But a reminder of elementary market rules highlights certain vulnerabilities.

Market operation requires providers (we use this term rather than “suppliers” for the purposes of this study), customers and prices: There must exist an offer of a good or service, a demand for the object of the offer, and a value to which provider and customer agree, in order to proceed to an economic transaction²². When the price offered corresponds to the price demanded and that the quantities offered correspond to the quantities demanded, economists estimate that the market is balanced²³. In a balanced market, no single actor can influence the price. However, economists admit that markets don’t operate perfectly: in many cases, a provider can set its price above that of the market without losing its entire clientele. Three avenues are then open to competitors: maintain their prices to preserve their profit margin; lower their prices to increase their market share; or raise their prices to increase their profit, on each good supplied, up to the level obtained by the provider that first raised the price.

The less competitors there are in a market, the greater the choices of each can influence the others’ strategies. In a monopoly, the sole provider can do whatever it wants. In an oligopoly, a small number of providers have a leading influence²⁴, but they must all take the others’ power into account. One of the competitors may indeed raise or lower its price, or otherwise change its offer, and the competitor’s weight may influence the market and in turn be influenced by reactions to its decision. By an apparent paradox, the market is thus energized by the rarity of competitors benefiting from demand inelasticity. But we will see that the market is not necessarily more efficient for all that.

Economists tend to evaluate the level of competition in a market by gauging demand elasticity: when it is high, so that a small increase in the price demanded by the provider makes it lose a large part of its clientele, we conclude that the market is highly competitive. Inversely, if a price increase has little effect on a provider’s market share, the market is doubtless not very competitive²⁵. In this case, each provider enjoys relatively great market power.

Other factors than price may yet dissuade the customer to abandon a provider for a competitor offering a better price at first sight. Certain change-related costs may pose obstacles to mobility. Accordingly, evaluating demand elasticity in real markets is a challenge. This is partly why the level of competition is so often determined by measuring

²¹ Stiglitz, Joseph E.; Driffill, John. *Economics*. London, W.W. Norton & Company, 2000. 756 p. P. 24.

²² *Ibid.*, pp. 58-70.

²³ *Ibid.*, pp. 71-73.

²⁴ *Ibid.*, pp. 250-1.

²⁵ *Ibid.*, p. 259.

the number of competitors present in a given market. But this second method of evaluating the level of competition is also problematic: the market must be studied geographically, but while taking into account a provider's product as well as possible substitutes and the degree of differentiation between products²⁶.

Market entry may face other barriers: Depending on the markets, financial, regulatory, infrastructure and other constraints may be prohibitive.

Finally, two factors may favour a competitor by enabling him to lower the unit cost of each object supplied: economies of scale (reduction of the unit production cost due to greater efficiency linked to an increase in production factors), and economies of scope (overall cost reduction linked to the joint development of several different products)²⁷. Economies of scale and scope contribute to market efficiency, but they may rise in inverse proportion to the level of competition.

These theoretical and abstract considerations are the background of our analysis. The telecommunications service markets appear to operate in an extremely imperfect manner: few competitors, many obstacles to customer mobility and provider entry, and existing providers enjoying significant economies of scale and scope.

Imperfect market operation has consequences. The more imperfect it is, the more serious the consequences may be. Accordingly, it becomes necessary either to increase competition or compensate for those negative consequences by means of interventions that don't originate from market forces alone.

Economists have established many methods for evaluating a market's degree of concentration: whether we use the market concentration index linked to the main participants²⁸, or the Herfindahl-Hirschmann index (or "HHI") retained by the United States²⁹, it is obvious that the Canadian telecommunications service markets that we are studying here are extremely concentrated. Indeed, an examination of the position enjoyed by the main actors in the major Canadian and provincial service markets yields eloquent findings. Those market rules assume that if a sufficient number of competitors have access to a market, the latter must operate efficiently and according to the laws formulated by economists. However, this normative structure omits a crucial problem: market rivalry does not guarantee true competition or a truly efficient market. Many factors can prevent a market of two or more providers from operating adequately.

Among those obstacles are various barriers to customer mobility that ultimately enable a provider to hold a captive clientele rarely able to change masters.

²⁶ *Ibid.*, pp. 259-262.

²⁷ Stiglitz *et al.*, *op. cit.*, p. 202. Regarding telecommunications, the capacity to provide both local telephone services and long distance telephone services thanks to the same local distribution infrastructure enables the provider to produce economies of scale. In short, an economy of scale exists when the simultaneous production cost of several elements is lower than the sum of the costs of producing those elements separately.

²⁸ *Ibid.*, p. 259.

²⁹ This index is calculated by summing the square of each competitor's market share taken as a percentage of a given market. United States Department of Justice; Federal Trade Commission. *Horizontal Merger Guidelines*. Washington, April 8, 1997. Pp. 15-17. The document, first published in 1992 and still in effect, is available at www.usdoj.gov/atr/public/guidelines/hmg.pdf.

1 - THE SITUATION IN CANADA

The field of telecommunications in Canada is immense and complex. It includes many means of communication and a wide variety of actors. The challenges are daunting: Canada's territory is the second-largest in the world, its population density is very uneven, and the obstacles to communications are many³⁰. No company perfectly services the entire country, and telecommunications services must be delivered regionally, if not locally.

The geography leads to wide variations. There is no single telecommunications service market in Canada. In fact, there is no single Internet market either: the active Internet providers are different in each province or region, and they may be distinct from the mobile telephony providers. Since we must take into account the distinctions between various types of services, we will refer to "service markets".

The scope of this study does not allow us to consider all these markets simultaneously; moreover, we assume that even a limited sample will highlight the main phenomena affecting these markets as a whole. We will thus focus on Quebec, Ontario and Saskatchewan, and on the three following means of communication: wired telephony, mobile telephony and Internet access service.

The *Telecommunications Act* defines telecommunications services by their technological characteristics³¹. Fortunately, the users, market participants and our main sources of statistical data all share this perspective.

If telecommunications service markets are relatively concentrated virtually everywhere in the world, they are particularly so in Canada, where the penetration rates of leading-edge technologies, notably in mobile telephony, are not remarkable. So we're a long way from highly efficient competitive markets in this country, and a consumer wishing to migrate often discovers that he has practically nowhere to go.

The number of competitors and their market shares don't tell the whole story. Even where several competitors exist, migration may be complicated by other factors, which we will now examine.

³⁰ Mountains and valleys can obstruct Hertzian waves; very long distances (as in the Northwest Territories and Nunavut) are an obstacle to building wired networks, as are rivers and bodies of water (rivers, lakes, bays and straits).

³¹ "(...) any wire, cable, radio, optical or other electromagnetic system, or any similar technical system, for the transmission of intelligence between network termination." *Telecommunications Act*, R.S.C., v. T-3.4, sec. 2(1).

B - Departure Costs

1 - THE CONCEPT

In a perfectly competitive market, providers and customers can change their behaviours at any time. A customer can easily change providers as soon as another provider makes him an offer he finds more advantageous. This freedom of choice and a certain market atomization are crucial aspects of the model used by neo-classical economics in relying on market forces³². If customers cannot easily change providers or cannot stop obtaining a product from a given source, the provider can more easily change its offer or price so as to increase its own profit, at the expense of other market participants.

The theories do not apply perfectly in the field: There may be too few providers or customers, or the freedom of customers may be hindered in various ways. For example, their needs may prove relatively inelastic: Whatever the price, the demand for certain essential goods and services will be relatively constant. Even regarding other needs, their choices may also be hindered by various obstacles.

Consumers can have three motives for not changing providers in a given market: there may not be a competitor; customers may be sufficiently satisfied with services not to deem it necessary to risk change; there may be obstacles making the customer reticent to leave his provider for another one.

Economists generally qualify those obstacles as “departure costs”. Certain departure costs imposed on clienteles are legitimate and correspond to the costs actually incurred by the provider³³. Others essentially aim to capture or build the loyalty of clienteles. This study is mainly interested in the latter obstacles, although it is not always easy to determine, in a specific case, whether the departure cost is economically justifiable or not.

2 - ANALYTICAL ELEMENTS

The variety of departure costs listed by economists means that we find them in a large number of markets. As they don't constitute of themselves a symptom of major market imbalance, we must analyze a given situation by taking many factors into account, including market concentration levels, saturation levels and pricing policies. But most economic models find that departure costs can skew a market by accentuating the benefits to certain providers at the expense of competitors and customers.

A) THE TEMPORAL DYNAMIC

Significant departure costs introduce a temporal dimension in market analysis, by transforming an isolated operation into a series of operations with the same provider³⁴. A

³² Stiglitz *et al.*, *op. cit.*, p. 24.

³³ Nasse, Philippe. *Rapport sur “les coûts de sortie”*. Paris, May 24, 2005. 40 p. and appendices. P. 8. The report is found on several Web sites, such as: www.telecom.gouv.fr/fonds_documentation/rapports/couts_sortie.pdf.

³⁴ Farrell, Joseph; Klemperer, Paul. *Coordination and Lock-Up: Competition with Switching Costs and Network Effects*. in *Handbook of Industrial Organization*. Vol. 3. M. Armstrong and R. Porter, Pub. Elsevier, North Holland, 2007. (Hereinafter “Farrell”). P. 1971. The entire text of this chapter is notably

consumer who buys an apple at the market is not exposed to departure costs if he decides the next day to buy fruit from a different merchant. On the other hand, a consumer who buys a printer and needs replacement cartridges from that provider will hesitate to end that relation and have to find and buy another printer. Unless he expects considerable savings in buying replacement cartridges, his costs in research, installation, uncertainty, equipment and incompatibility are very likely to dissuade him.

The temporal dimension added by the ongoing business relation requires an adjustment to the analysis of market operation. Indeed, departure costs may cause competition to play a relatively small role in a given market, depending on the level of competition in that market³⁵.

Another phenomenon must be taken into account: The price of second-stage goods or services may be absolutely independent from the contract reached at the first stage, or it may vary at the whim of the provider³⁶, which finds itself in a virtual monopoly toward a captive customer due to the departure costs.

This two-stage process can lead to a practice of baiting the customer through the price of the initial good or service, while the price of products or services required afterward enables the company to profit from the business relation. Customers who hesitate to confront departure costs can end up paying dearly for the initial bargain.

B) DISCRIMINATION BETWEEN CUSTOMERS

The impact of departure costs on a market is modulated by three factors: disparity between competitors, market dynamism and price differentiation, and their role can become decisive. To counter or compensate for departure costs incurred by customers who want to switch to another service provider, the latter may offer its new customers a discount. As soon as a new customer has migrated, that provider will want to keep its own prices and departure costs high. Price modulation between new and captive customers is often not only an indication of high departure costs in a market³⁷, but also a factor that leads to their increase, since the service provider has every interest in obstructing the migration of customers constituting a highly valuable asset.

Price modulation can adopt many forms: for example, rate reductions may be offered to target clienteles such as young people or new customers³⁸; a free device may be offered them when the contract is signed. The value of such advantages will often be greater than that of “gifts” that may be offered when a customer renews his contract; the value of the various bonuses is submerged in the overall prices, so that a comparison is generally impossible and the consumer cannot determine how profitable it would be for him to change service providers rather than renew a contract.

found at: www.nuff.ox.ac.uk/users/klemperer/Farrell_KlempererWP.pdf. We use here the pagination in the *Handbook*.

³⁵ *Ibid.*

³⁶ *Ibid.*, pp. 1971-1973.

³⁷ National Economic Research Associates. *Switching Costs. Part one: Economic models and policy implications*. Economic Discussion Paper 5. London, Office of Fair Trading – Department of Trade and Industry, April 2003. (Hereinafter “OFT”). P. 70. The report itself is available at: www.of.gov.uk/shared_of/reports/comp_policy/oft655.pdf.

³⁸ Nasse, *op. cit.*, p. 11.

C) EFFECTS OF DEPARTURE COSTS

The establishment of high departure costs by a service provider holding a substantial market share obviously may hinder the arrival of new competitors, since they will have to overcome customers' fear of those costs. A competitor may attempt to attract consumers by offering clearly superior products or by agreeing to compensate a migrating customer regarding those costs; lower expected profitability would of course likely slow down the development of competition.

The departure costs imposed in turn by the new competitors may, on the other hand, constitute an advantage in their favor; the risk of investing to acquire a pool of customers is compensated by the possibility that those new customers will be loyal long enough to make the market entry efforts profitable. Competition could then become very lively when a market is created or opened, and later diminish because providers will prefer to keep prices high and exploit customers rather than wage price wars that might prove less profitable in the end. Market operation will also be significantly influenced by the relative novelty of a product or service: Since, at least for a time, the great majority of customers are new to the market, departure costs do not figure in their decision to obtain that product or service³⁹. In a mature market, departure costs will rather tend to freeze the actors' market shares⁴⁰.

The various departure costs don't all have the same impact: for example, informational departure costs obstruct customer mobility less than other types of costs, such as contractual costs⁴¹. Research and management costs may provoke another, paradoxical effect: Since consumers can realize economies of scope by obtaining several services from a single provider, competitors will often offer service "bundles".⁴²

When departure costs are significant, it may appear more advantageous for competitors to offer precisely the same type of products as their rivals, rather than attempt to diversify their offer⁴³. On the other hand, the necessity of providing a wide range of products in order to be competitive may strongly obstruct the market entry of new competitors that don't have the means to offer such a complete bundle⁴⁴.

3 - Establishing a typology

Some departure costs are relatively easy to detect, if not evaluate. Others affect behaviour more subtly: exclusive content, notably. Changing mobile telephone providers, for example,

³⁹ Nasse, *op. cit.*, p. 8. Indeed, they don't have to "leave" a contractual relation. It is of course possible that they take departure costs into account prospectively, before entering into that relation, but in fact they are rarely able to measure *ex ante* with sufficient accuracy.

⁴⁰ Ultimately, departure costs also tend to make the major providers' markets converge, because the incumbent operators focus on retaining and exploiting their captive clientele, without making efforts to attract new customers, whereas companies entering the market attract most of the new customers, until the market stabilizes: OFT-C, *op. cit.*, p. 33.

⁴¹ Farrell, *op. cit.*, p. 1991.

⁴² Farrell, *op. cit.*, p. 1995.

⁴³ For an analysis of that effect, see, OFT, *op. cit.*, pp. 46-47.

⁴⁴ Farrell, *op. cit.*, pp. 2000-1.

can entail not only the need to become familiar with a new device's features, but also the loss of content or of access to exclusive content⁴⁵.

Other existing advantages can also be appreciated by consumers to the point of constituting departure costs, regardless of their actual financial value. This is the case for "bundles": consumers depend on a single provider and receive a single monthly invoice ("single billing")⁴⁶. This may facilitate the consumer's management of problems and payments⁴⁷, but may involve disadvantages in terms of actual price and market rigidity.

While certain departure costs are at times inevitable and "natural", a provider has some latitude to impose others, to its own advantage. Captivity costs, including punitive clauses in the event that the customer cancels the contract, are a good example of this. Equipment costs entailed by the provider's choice of non-standard equipment⁴⁸ are another example⁴⁹. Departure costs come in many types and modalities. We will focus here on a type inspired by a classification recently used in the United States to distinguish the types of departure costs in the field of mobile telephony⁵⁰. We can already establish the following categories and headings with regard to departure costs or related barriers:

1 - Informational costs

- 1.1 research costs: costs related to obtaining, comparing and analyzing data regarding market offers⁵¹;
- 1.2 opacity costs: costs related to the impossibility of distinguishing the actual cost and price of each component of a service offer;
- 1.3 training costs: costs of configuring new services and learning their use and features;
- 1.4 uncertainty costs: costs resulting from missing or inadequate information about offers or providers, including total cost, service quality or provider reliability;
- 1.5 psychological costs: costs related to breaking a relation with a provider;

2 - Technological costs

- 2.1 equipment costs: costs of the need to obtain equipment (including software) that is exclusive to a given provider and cannot be used for obtaining services from a substitute provider;
- 2.2 costs of features: costs of losing the enjoyment of features that have no equivalent in the devices of a substitute provider;

⁴⁵ Baker, Christopher. *Breaking Up Is Hard to Do: Consumer Switching Costs in the U.S. Marketplace for Wireless Telephone Service*. Washington, AARP Public Policy Institute, October 2007. 26 p. (Hereinafter "AARP") P. 19-20. Strategic use of exclusive content is particularly widespread in North American mobile telephony. Other regions have adopted practices more favourable to sharing. Online: http://assets.aarp.org/rgcenter/consume/2007_18_wireless.pdf.

⁴⁶ *Ibid.*, p. 20.

⁴⁷ At least in principle: serious billing problems experienced by Bell in 2006, attributable notably to the outsourcing of their billing processes, mitigate this theoretical advantage.

⁴⁸ The incompatibility of equipment can also generate network effects: Farrell, *op. cit.*, pp. 2047 ss.

⁴⁹ *Ibid.*, p. 2001 (footnote omitted).

⁵⁰ AARP, *op. cit.*, p. 4. We have also borrowed from Farrell, *op. cit.*

⁵¹ While some economists estimate that research costs constitute a cost category distinct from departure costs, they can be considered part of the latter: Farrell, *op. cit.*, p. 1978.

- 2.3 incompatibility costs: costs of the impossibility of combining already-acquired equipment with the equipment required by the substitute provider;
- 2.4 costs of exclusive content: costs of losing access to content (ring tones, music...) offered by a provider, but not by its substitute providers;
- 2.5 portability costs: costs of the impossibility of continuing to use an e-mail address or a personal Web site address after changing providers, or costs of red tape required to make an address or other identifier portable;

3 - Contractual costs

- 3.1 captivity costs: costs related to the term of supply contracts and to punitive clauses in the event of early termination;
- 3.2 networking costs: costs of losing the advantages of communications between subscribers to the same provider⁵²;
- 3.3 disloyalty costs: costs of losing the advantages of a loyalty program or of non-transferable services;
- 3.4 bundle costs: costs of losing the advantages of other services received by the same provider, except for management costs;
- 3.5 management costs: costs of losing the advantages of management simplified by receiving several services from a single provider;
- 3.6 superfluity costs: costs of obtaining goods or services that are not needed or desired.

It is thus easy to identify more than fifteen types of departure costs that can, at least in principle, hamper the fluidity of telecommunications service markets.

Of course, not all these costs directly make the consumer spend money. For example, research costs usually cost time rather than an easily determined amount of money. Still, the efforts made to analyze the market involve an opportunity cost: The consumer would probably have preferred to do something else. This can certainly motivate him to renew his contract with a provider, rather than try to determine whether other offers in the market might better suit his needs.

Quantifying and evaluating the impact of departure costs poses special problems that clearly exceed the scope of this study, but that are generally observed by experts⁵³. Certain methods have been devised in an attempt to measure such costs⁵⁴; we have not attempted to use those methods here, mainly because of insufficient available data⁵⁵.

⁵² As for the more general network effects on competition, see Farrell, *op. cit.*, pp. 2007 ss.

⁵³ For example, Nasse, *op. cit.*, p. 9; OFT, pp. 67-83.

⁵⁴ With regard to mobile telephony, see for example: Shy, Oz. *A quick-and-easy method for estimating switching costs*. (2002) International Journal of Industrial Organization, vol. 20, No. 1, 71-87.

⁵⁵ The same difficulty has arisen in France: Nasse, *op. cit.*, p. 13.

IV – LEGAL CONSIDERATIONS

Free-market economics focuses on usefulness, and the legal system on justice⁵⁶. The legal system must therefore try to prevent or eliminate abuses, whether in the market as a whole or in particular relations.

An analysis of barriers to customer migration must adopt a double perspective. On the one hand, competition law aims to prevent market participants from discouraging competition or commit other abuses. On the other hand, private law, including consumer law, tends to prohibit provisions that, in a contract between a company and its consumer, would be unfair in some way.

We will examine these two aspects of Canadian law. We will also summarize certain foreign experiences from which the Canadian legal system might learn.

A - The Canadian framework

1 - THE CONSTITUTIONAL QUESTION

Before examining relevant legal regulations and instruments (contracts, notably), we will briefly consider an aspect peculiar to a federal structure such as Canada's: the constitutional division of powers.

Sections 91 and 92 of the *Constitution Act of 1867* form the basis of the division of powers between federal and provincial jurisdictions. The provinces have jurisdiction over property and civil law, and therefore over regulations governing contracts and commercial practices. The federal government has broad jurisdiction over trade, matters not assigned to the provinces and, under subsections 91 (29) and 92 (10), certain types of work and companies that are not "local in nature".

In interpreting those two subsections, the courts decided that telecommunications are an exclusive jurisdiction of the federal Parliament⁵⁷. There is no doubt that wired telephony falls under federal jurisdiction according to case law. Mobile telephony is so intimately related to wired telephony that it is difficult to imagine how the Supreme Court of Canada could reach another conclusion than recognizing federal jurisdiction in this area as well⁵⁸. Likewise for the provision of Internet access services⁵⁹.

⁵⁶ Aristotle. *Nicomachean Ethics*. Cambridge, Cambridge University Press, 2000. 258 p. Book V, 1.8.

⁵⁷ *Alberta Government Telephone v. Canadian Radio-Television and Telecommunications Commission*, [1989] 2 S.C.R. 225; *Téléphone Guévremont Inc. v. Régie des télécommunications du Québec*, [1994] 1 S.C.R. 878.

⁵⁸ All the more so because mobile telephony technically requires radiocommunication processes that themselves belong to exclusive areas of federal jurisdiction: *In re Regulation and Control of Radio Communications in Canada*, [1932] A.C. 304 (P.C.).

⁵⁹ *Re Island Telecom Inc. et al.*, [2000] CIRB No. 59. The decision is found at www.cirb-ccri.gc.ca/collections/publications/decisions/RD0059_b.pdf.

On the other hand, Parliament's jurisdiction over trade enables it to provide a framework for competition nationally⁶⁰.

Whereas Parliament and the provinces can legislate only in their own areas of jurisdiction, the courts have frequently examined the "essence and substance"⁶¹ or the "true nature"⁶² of laws in order to determine whether the latter fell under the jurisdiction of the government that had enacted them⁶³. Contracts being under provincial jurisdiction and telecommunications under federal jurisdiction, who can legitimately legislate on telecommunications contracts⁶⁴? Since a question can have a *double aspect* and a legislative (or regulatory) measure two natures⁶⁵, two legal regulations – one from Parliament and the other from a province – may apply simultaneously to a given situation. Those regulations can cohabitate as long as they are not divergent⁶⁶ to the point that the triable party cannot comply simultaneously with the provincial and federal laws⁶⁷.

The provinces can certainly impose some obligations on "federal undertakings"⁶⁸, and federal companies regularly apply provincial regulations, notably in matters of obligations and property⁶⁹. The Supreme Court recently noted that a federal undertaking cannot have "immunity" with respect to provincial laws: On the contrary, it is necessary to "favour [...] the ordinary operation of statutes enacted by *both* levels of government." Whereas provincial law may "affect" parts of a federal undertaking, it can in no case constitute an *impairment* to an essential part of that undertaking⁷⁰.

Parliament may, directly or by delegation, impose rules of behaviour to telecommunications service providers. However, the federal policy is to deregulate this sector as much as possible; the risk of incompatibility between federal and provincial regulations is thus reduced by the federal government's withdrawal in this area. The courts have indeed

⁶⁰ *G.M. v. City National Leasing*, [1989] 1 S.C.R. 641.

⁶¹ The English formulation (*pith and substance*) was used for the first time in the context of Canadian constitutional law in the decision *Union Colliery Co. v. Bryden*, [1899] A.C. 580 (P.C.).

⁶² *Canadian Western Bank v. Alberta*, 2007 SCC 22, § 25.

⁶³ See: *Reference re Employment Insurance Act*, [2005] 3 S.C.R. 669, which is a good summary of issues involved when classifying a law in terms of the distribution of powers.

⁶⁴ As an example of the distribution of powers with regard to contractual matters in an area of federal jurisdiction, see the Barfried decision: *A.-G. Ontario v. Barfried Enterprises Ltd.*, [1963] S.C.R. 570.

⁶⁵ *Hodge v. The Queen*, (1883) 9 App. Cas. 117, 130. There may also be a complex overlap of federal and provincial jurisdictions, particularly in cases where a field such as environmental (or consumer) law was not attributed explicitly to either jurisdiction in the *Constitution Act, 1867* or elsewhere: *Friends of the Oldman River v. Canada*, [1992] 1 S.C.R. 3; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213.

⁶⁶ Hogg, Peter. *Constitutional Law of Canada*. Student Edition. Toronto, Carswell, 1998. P. 384.

⁶⁷ *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, whose principles were confirmed and clarified in the decision *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113. In a recent decision, the Supreme Court of Canada reviewed and clarified the regulations on the distribution of powers: *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22.

⁶⁸ Companies operating in areas of federal jurisdiction are often called "federal undertakings".

⁶⁹ Banks daily grant mortgage loans under the provisions of the *Civil Code of Québec*, for example.

⁷⁰ *Ibid.*, § 48.

recognized that a provincial law may validly prevent a federal undertaking from taking certain actions, even if that undertaking might thereby be inconvenienced and lose income⁷¹.

After examining the federal legal framework, we will consider various provincial laws that seek to protect consumers and that could apply to the contractual or business practices of telecommunications companies. Given the assumption that laws are constitutional⁷², we will assume, for the purposes of our analysis, that those provincial regulations apply to the behavior of telecommunications service providers.

2 - COMPETITION

The *Competition Act*⁷³ is the main instrument of competition law in Canada. Its application is entrusted to the Competition Bureau and an expert tribunal, the Competition Tribunal. The Act has a general application, but that application is subject to practical arrangements by the courts and its enforcement arms whenever another legal framework governs a given economic activity⁷⁴, as is the case for telecommunications.

The study of competition is now an integral part of the CRTC's mandate; given that the CRTC has been given the obligation to favor market forces as much as possible, its powers and the possibility of using them will depend on that study.

A) THE FRAMEWORK OF THE TELECOMMUNICATIONS ACT

i) Developments up to 2007

After a long period of granted and legally regulated monopolies, pressure to establish a competitive framework for telecommunications have appeared in Canada⁷⁵. The Canadian regulatory framework has evolved more or less successfully by adopting the axiom that free-market competition must be the best way to regulate the markets and protect the interests of all the actors.

Accordingly, as early as 1993, a new *Telecommunications Act*⁷⁶ established a Canadian policy to “foster increased reliance on market forces”⁷⁷ – while regulations, when necessary, would have to be effective – and to “respond to the economic and social requirements of users of telecommunications services”⁷⁸. Two key provisions of the Act, sections 24 and 34, now direct the CRTC, which can set conditions for providing services or approve rates, in order to implement the Canadian policy.

⁷¹ *Irwin Toy Ltd. v. Quebec (P.G.)* [1989] 1 S.C.R. 927.

⁷² *McKay v. The Queen*, [1965] S.C.R. 798; *Manitoba (P.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110; *R. v. Sharpe*, [2001] 1 S.C.R. 45, notably.

⁷³ *Competition Act* (R.S.C., 1985, ch. C-34)

⁷⁴ An overview of this issue is found in Competition Bureau. *Technical Bulletin on “Regulated” Conduct*. Gatineau, June 2006. 8 p. Available at: www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02141e.html.

⁷⁵ See for example: Janisch, Hudson. Schultz, Richard. *Exploiting the Information Revolution: Telecommunications Issues and Options for Canada*. Montreal, Royal Bank of Canada, October 1989.

⁷⁶ *Telecommunications Act* (1993, ch. 38)

⁷⁷ *Telecommunications Act*, R.S.C., v. T-3.4, par. 7 f).

⁷⁸ *Ibid.*, par. 7 f) and h).

On the one hand, the CRTC must, in principle, closely regulate the activities of telecommunications companies. On the other hand, it must abstain to do so, under paragraph 34 (2), if it concludes that the market *is* “subject to competition sufficient to protect the interests of users” or that it *will be so*. The CRTC’s conclusion, even when it is supposed to predict the future, can lead to the primacy of the free market over regulatory intervention. Since then, the Commission has rendered a number of decisions that have reflected the changed regulatory framework. In 1994, the CRTC indicated that where competition appeared sufficient, it would not hesitate to abstain from regulating⁷⁹. The CRTC was establishing a framework allowing local competition, and thus the entry of new providers. In markets that were not yet competitive, including facilities that could be used to block new competitors in the market, the CRTC already planned to remove “restrictions on entry into the local market”, such entry being considered in the public interest⁸⁰.

Being lucid, the CRTC observed that the incumbent providers would still be dominant in their markets “for some time to come”. It therefore had to set criteria to determine when a market actually became competitive and thus should not be regulated.

So we witnessed the deregulation of some of the services offered by the incumbent providers, the appearance of competitors in those service markets (including long distance telephony) and the growth of little-regulated service markets such as mobile telephony and Internet access⁸¹.

ii) A new plan

In December 2006, the Governor in Council gave the CRTC instructions on the way it should implement the Canadian telecommunications policy⁸². That decree mandates that support to the development of healthy competitive markets be emphasized. When the CRTC deems it necessary to establish regulations, it has to demonstrate explicitly that they reflect the directions imposed: in essence, in order to act the CRTC has to demonstrate that it still has the power to do so.

Debates about a certain CRTC decision have illustrated how government policy will be applied. Following a request presented by an incumbent provider inviting the CRTC to abstain henceforth from regulating its activities since sufficient competition prevailed in the telecommunications markets, the CRTC decided to announce precisely the framework whereby it would henceforth analyse requests for regulatory waivers. However, the Governor in Council decided to amend a few aspects of the CRTC’s long decision document⁸³, by decreeing firstly that the growth of new technologies was changing the rules of the game, secondly that competitors would have to acquire their own facilities and not act solely as resellers, and finally that the new rules should create or maintain a sufficiently competitive market.

⁷⁹ In the decision titled *Review of Regulatory Framework* (Telecom 94-19), 16 September 1994.

⁸⁰ *Ibid.*

⁸¹ The CRTC in fact decided to abstain from regulating these types of services, because it found the markets sufficiently competitive.

⁸² *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives* S.O.R./2006-355, registered on 14 December 2006.

⁸³ *Order Varying Telecom Decision CRTC 2006-15*, S.O.R./2007-71, 4 April 2007.

Accordingly, on August 3, 2007, the CRTC approved the request for it to abstain from regulating local residence services provided to vast Quebec and Ontario territories, including the Montreal, Quebec City, Ottawa and Toronto areas⁸⁴. On that same day, the CRTC also decided to abstain henceforth from regulating in the Saskatoon, Saskatchewan area, since the criteria set by the amended decision were reportedly respected there⁸⁵. Other decisions of the same nature were taken by the CRTC in the same year, and many others in the following years.

iii) A few specific measures

A subscriber might hesitate to change telephone numbers; such a change could make him hard to reach unless he advised all his correspondents of the change. It was thus important that this identifier be transferred easily to another service provider. To eliminate this major barrier to customer mobility, the CRTC began in 1999 a process favouring telephone number portability, and established rules applying to all telephone service providers⁸⁶. However, it should be noted that there is nothing to mandate the portability of e-mail addresses, since the CRTC generally abstained from regulating the provision of Internet access services.

“Winback” rules were adopted by the CRTC in 1998 regarding local telephony, to limit the former monopolies’ ability to target offers to consumers who wanted to migrate. Those rules, amended in 2002 and 2004, and then in 2005 when extended to VoIP telephony, were confirmed in 2006⁸⁷, albeit with less-severe restrictions. The *Order Varying Telecom Decision CRTC 2006-15*, however, eliminated most of the decision’s paragraphs on winback rules for Internet services in 2007, while claiming that those markets were now sufficiently competitive to make those rules unnecessary⁸⁸.

In December 2006, the Governor in Council issued decrees to the CRTC to implement the Canadian telecommunications policy. That decree led the CRTC to adopt an action plan to review the regulatory framework. That plan notably called for reviewing, in 2007-2008, issues about the mandatory issuance of a prior notice in the event of automatic contract renewal, and the result was *Telecom Decision CRTC 2008-22*⁸⁹. The question was whether

⁸⁴ CRTC. *Telecom Decision CRTC 2007-65 – Bell Canada – Applications for forbearance from the regulation of residential local exchange services*. Ottawa, 3 August 2007. Under section 34 of the *Telecommunications Act*, the decision was not applied to a total of 191 exchange areas.

⁸⁵ CRTC. *Telecom Decision CRTC 2007-66 – Saskatchewan Telecommunications – Application for forbearance from the regulation of residential local exchange services*. Ottawa, 3 August 2007.

⁸⁶ See: CRTC. *Telecom Decision CRTC 2008-11 – Review of local number portability for voice over Internet Protocol services*. Ottawa, 1 February, 2008. The text is a brief overview of the CRTC’s interventions regarding portability over the last decade.

⁸⁷ CRTC. *Telecom Decision CRTC 2006-16*. Ottawa, 6 April 2006. We have retained the essential points of those rules in this brief summary.

⁸⁸ CRTC. *Telecom Decision CRTC 2007-97 – Elimination of the winback rules for Digital Subscriber Line Internet and higher speed access services*. Ottawa, 5 October 2007.

⁸⁹ CRTC. *Telecom Decision CRTC 2008-22 – Mandatory customer contract renewal notification and requirements for service destandardization/withdrawal*. Ottawa, 6 March 2008. In 2003, the Council had ordered Bell and Telus to provide two notices to business customers with whom they reached an agreement including an automatic renewal clause – the first notice 60 days before the end of the contract, and the other within 35 days following automatic renewal; this second notice would have allowed the customer to cancel the agreement without penalty within 30 days.

the obligations imposed in 2003 should be maintained. One competitor, notably, pleaded for their maintenance, while invoking the departure cost constituted by automatic renewal. The Public Interest Advocacy Centre alleged, for its part, that this prior notice obligation should be extended to residential customers living in areas where local services are deregulated. The incumbent providers opposed in particular the administrative burden of those obligations.

The CRTC, reluctant to consider arguments related to departure costs, rejected the arguments based on the anti-competitive effect of automatic renewal clauses without prior notice, and chose to lighten the administrative load of incumbent providers by maintaining only a prior notice of 60 days before a contract ends and automatic renewal is triggered. Moreover, the CRTC estimated that issues regarding the extension of a prior notice to residential subscribers exceeded “the scope of this proceeding”. So there is no prior notice obligation for automatic renewals in the residential sector.

The CRTC’s action plan also calls for a review of the Consumer Bill of Rights, established in 2006⁹⁰, which affirms the right of local service subscribers to choose their provider and change providers where competition exists, as well as the right not to obtain all services from a single provider, and which addresses the contract cancellation issue. According to the Bill of Rights, the subscriber has the right to cancel his contract at any time, while giving the provider “reasonable notice”.

It should be noted that the CRTC publishes a consumer guide to competition⁹¹. That guide contains a few basic explanations of the mechanisms for changing providers and the practices to which a consumer may be exposed, including the invitation to group all his telecommunications services with a single provider. In the event of dissatisfaction, the guide invites consumers to communicate with the CRTC “if the complaint is about a regulated telephone service provider”, or with the Commissioner for Complaints for Telecommunications Services (CCTS) in other cases and when the provider subscribes to that “agency”.

⁹⁰ CRTC. *Telecom Decision CRTC 2006-52 – Statement of consumer rights*. Ottawa, 29 August 2002. The statement has already been amended by *Telecom Decision CRTC 2006-78*.

⁹¹ CRTC. *Consumer guide to competition in the residential telephone market*. Gatineau, last update on February 20, 2008. Available at www.crtc.gc.ca/eng/info_sht/t1023.htm.

B) THE COMPETITION ACT AND ABUSES

i) Background

The main Canadian legislative instrument in matters of competition is the *Competition Act*⁹². The provisions regarding abuses of market dominance are most likely to be relevant to the purposes of this study.

The implementation of sections 78 and 79 of the *Competition Act*, with regard to abuses of dominance, poses many difficulties. To detail the sections' eventual impact specifically on telecommunications, the Competition Bureau undertook in fall 2006 a consultation related to a draft newsletter⁹³. We will use the latter here to evaluate to what extent those sections of the Act could alleviate departure costs and other obstacles to the mobility of residential telecommunications services in Canadian markets.

The heart of the Canadian measures regarding abuses of dominance is found in the first paragraph of section 79 of the *Competition Act*, which empowers the Competition Tribunal to prohibit a dominant company from taking anti-competitive actions (listed in section 78) likely to significantly reduce competition in a market⁹⁴. The Tribunal can combine its order with an administrative fine of up to \$15 million⁹⁵.

ii) The “market” concept

The Competition Bureau recognizes that examining the impact of departure costs on competitiveness and on possible abuses would pose an enormous challenge.

The first difficulty in applying section 79 of the *Competition Act* to telecommunications has to do with defining the market itself. It is indeed necessary to specify what would be the object of abuse. The criteria involve the services concerned as well as the territory where abuses are alleged. Substitutes to the object of abuse can be included in the market determination, but identifying the substitutes poses thorny problems regarding telecommunications services. For example, can mobile service or VoIP telephony be considered substitutes for wired service, of which they provide some – but not all – of the advantages?

In addition, the various providers' offers are differentiated (the various companies' bundles have different components, in different proportions, at different prices). Are the products included in a bundle substitutes for those sold separately, and vice-versa? A detailed analysis of those various services is thus necessary, simply to circumscribe the service market where we will try to determine whether there has been abuse of dominance. Moreover, the more substitutes are added to the analysis, the more difficult it will be to

⁹² R.S.C., v. C-34.

⁹³ Competition Bureau. *Draft - Information Bulletin on the Abuse of Dominance Provisions as applied to the Telecommunications Industry*. Gatineau, September 26, 2006. 31 p. (Hereinafter “Draft”). Despite the hope expressed by Ms. Scott in April 2007 to “be able to finalize the document by later this spring” (Scott, *op. cit.*), the final version of that bulletin still does not appear to have been adopted. Despite comments from many parties, we can expect the Bureau not to fundamentally change the Draft, which reflects her overall interpretation of sections 78 and 79 of the Act.

⁹⁴ Case law additionally imposes evidence of explicit intent, or at least of behaviour reasonably assumed to have a negative effect on a competitor: *Commissioner of Competition v. Tuyauteries Canada Ltée/Canada Pipe Company Ltd.*, [2007] 2 F.C.R. 3, §§ 67, 70-73.

⁹⁵ *Competition Act*, par. 79 (3.1) to (3.3).

demonstrate that a provider's actions, with regard to a particular feature, are unfair in the market under study.

The situation is no simpler when we consider territorial markets: the territories serviced by the competitors are not identical, so that a relatively precise analysis is required to delimit the boundaries of each market where we want to determine whether competition is adequate or not.

The stage of market determination is crucial for examining possible abuse of dominance because, in the procedure followed by the Competition Bureau, it is attempted to establish whether a competitor is capable of imposing a "small, but significant and non-transitory increase in price" (SSNIP) in a market defined as "the smallest group of substitute products and the smallest geographic area that a firm must control"⁹⁶ to maximize its profits.

It should also be specified that the concept of "price" covers in this context not only the amount demanded for a good or service, but also non-monetary factors such as variation in quality⁹⁷: even if the amount on the label doesn't change, there is of course the equivalent of a price change if the quality of the good is clearly diminished. An evaluation of variations other than monetary is obviously more complex than that of a change in price alone.

In analyzing substitutes for the purpose of market determination, the Bureau takes into account departure costs, which it calls "switching costs":

The Bureau would also consider whether there are costs involved in switching, which would make switching a less likely response to an SSNIP. Examples of such switching costs include penalties associated with terminating an existing contract before it expires; service charges associated with migrating to another service provider; and new equipment that is required to use a similar service offered by a competitor (e.g., a wireless phone handset)⁹⁸.

In that perspective, departure costs per se don't constitute abuse of dominance, but are rather a factor taken into account to determine whether other practices might be unfair in the sense of section 79 of the *Competition Act*.

iii) "Market power"

Once a market has been determined, the question is whether it is controlled significantly by a person or a small group that would be capable of imposing a SSNIP⁹⁹. Can someone have "market power"?

The Bureau considers that "high market share is usually necessary, but not sufficient, to establish market power" and that a market share exceeding 35% is generally the benchmark for suspecting a competitor of having a dominant market position¹⁰⁰. In many Canadian market segments, that level is exceeded by a wide margin. Of all the tests necessary to

⁹⁶ *Ibid.*, p. 5. The Bureau generally estimates that a real price increase of more than 5% compared to the competitive price is likely to constitute an SSNIP.

⁹⁷ *Ibid.*, p. 5, note 13.

⁹⁸ *Ibid.*, pp. 8-9.

⁹⁹ *Ibid.*, p. 11.

¹⁰⁰ *Ibid.*, p. 12.

convince the Competition Tribunal that abuse of dominance exists in the Canadian telecommunications industry, this one will doubtless be least difficult.

iv) Market entry

A competitor's market entry is conditioned by its market share, but also by the ease with which other companies might enter the market to threaten it. In a market where few obstacles block the entry of new providers, a company that abuses its position, for example by keeping prices too high, risks facing in short order new rivals who will overtake it by setting more-reasonable prices. On the other hand, if market entry is very difficult, an unfair provider worries less about the arrival of adversaries.

The arrival of new competitors may be blocked by several factors, such as: the magnitude of required investments, which may prove irrecoverable in the event of commercial failure; daunting regulatory constraints; the reputation of established providers; long-term contracts limiting customer mobility and thus reducing the chances of a new competitor's short-term success¹⁰¹.

Again, although departure costs can obviously block the entry of new providers, they are not considered to be practices that are unfair in and of themselves.

v) "Anti-competitive activity"

Once a market has been defined and indications have been found that competitors might be exercising market power, it is necessary to demonstrate the existence of anti-competitive activity, i.e., practices of a predatory, exclusionary or disciplinary nature, that are intended to have a negative effect on a competitor¹⁰².

Departure costs can be grouped among the practices aiming to increase competitors' costs. For instance, long-term contracts oblige new rivals to compensate migrating subscribers for the penalties they incur. The choices aiming to limit the technological compatibility of networks make market entry more difficult for competitors equipped with incompatible technology¹⁰³; for example, those competitors will have to convince mobile phone subscribers to change handsets, and they may have to attract those consumers by giving away handsets. All these factors inevitably raise the costs incurred by rivals attempting to gain market share.

Very low and targeted pricing for the purpose of recovering lost customers may also be grouped in some cases among anti-competitive practices, but only if they are demonstrated to thwart competition and if they go beyond "normal" competitive behaviour¹⁰⁴.

In some cases, the Bureau estimates that bundling can also present anti-competitive aspects:

Bundling could prompt concerns if it is viewed as a means to raise the costs for rivals or, in the alternative, as a means by which to engage in predation. In terms of raising rivals costs, a practice of bundling may meet the competition law definition of tied selling. In this context, if it is shown that the practice is impeding entry or

¹⁰¹ *Ibid.*, p. 13.

¹⁰² *Ibid.*, p. 16.

¹⁰³ *Ibid.*, p. 17.

¹⁰⁴ *Ibid.*, p. 23.

*expansion of firms offering some or all of the bundled services, or is having some other form of exclusionary effect, it could constitute an anti-competitive act. By way of example, a long-term contract that is required in conjunction with the sale of a bundle could constitute an anti-competitive act if it is designed to raise rivals costs. With respect to predation, the practice of bundling could be viewed as an anti-competitive act when a firm offers below avoidable cost pricing for the bundle of products.*¹⁰⁵

We recall that detecting certain practices is insufficient to infer anti-competitive activity. Bundling may be justified by many legitimate business reasons, so it is likely to be extremely difficult to demonstrate that a company's offer has been structured to exclude competitors or that a reasonable expectation of this result was decisive in formulating the company's strategy.

Moreover, a competitor's bundling can ultimately lead to an excessive offer of services that would make the market less efficient; but according to the Bureau, while that would be a negative impact on competition, it does not constitute abuse of dominance.

Others opine that, as opposed to American law¹⁰⁶, Canadian provisions with regard to abuse of dominance and the Bureau's interpretation could not sanction a situation where a company benefits from a first mover advantage¹⁰⁷ in a market. In markets such as wired telephony and Internet access service, where the first mover has built an infrastructure that almost amounts to a natural monopoly, competitors that have to choose between duplicating such networks or rely on the benevolent collaboration of their predecessor are thus at the mercy of a rival.

vi) A "substantial lessening of competition"

Once all these aspects are established, it remains to prove that the activities reproached have led to a substantial lessening of competition. For the Bureau, the question is formulated as follows:

*The Bureau analyzes a potential substantial lessening or prevention of competition using a "but for" test: "but for" the practice in question, would there be substantially greater competition in the relevant market, in the past, present, or future?*¹⁰⁸

The bar is terribly high: to conclude that abuse of dominance has taken place, the impact of a deliberate anti-competitive activity by a market leader must even be decisive. No wonder sections 78 and 79 of the *Competition Act* have so rarely provoked decisions against companies contravening the provisions.

Can practices aimed at limiting the migration of telecommunications companies' customers be considered abuses of dominance? We have seen that the Bureau considers them mainly as indications for setting market boundaries and as obstacles to the entry of new competitors. However, some of those practices could, by their very nature, constitute anti-competitive acts. Nevertheless, in markets where many rivals have similar practices and can

¹⁰⁵ *Ibid.*, pp. 24-25 (footnote omitted).

¹⁰⁶ QISPC, *op. cit.*, p. 7.

¹⁰⁷ Usually translated by *position de premier entrant*.

¹⁰⁸ Draft, p. 25 (footnote omitted). The Bureau notes that this statement was endorsed by the Federal Court of Appeal in *Canada Pipe*, *op. cit.* § 38.

claim that their strategies' purposes are legitimate, and not predatory, it is most likely to be extremely difficult to jump over all the hurdles set up by the Canadian legal framework in this field.

vii) Europe...

The Canadian framework may be contrasted with the one established by the Treaty founding the European Community, and retained in essence by several member states of the European Union. Abuses of dominance are covered within the Union mainly by sections 82 and 85 of the Treaty:

82. *Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.*

Such abuse may, in particular, consist in:

- a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
- b) limiting production, markets or technical development to the prejudice of consumers;*
- c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
- d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*

85

1. Without prejudice to the provisions of Article 84 [¹⁰⁹], the Commission shall ensure the application of the principles laid down in Articles 81 and 82. It shall, at the request of a Member State or ex officio, investigate, in conjunction with the competent authorities of the Member States which shall lend it their assistance, any alleged infringement of the above-mentioned principles. If it finds that such infringement has taken place, it shall propose appropriate means for bringing it to an end.

2. If such infringement continues, the Commission shall, by means of a reasoned decision, confirm the existence of such infringement of the principles. The Commission may publish its decision and may authorize Member States to take the necessary measures, of which it shall determine the conditions and particulars, to remedy the situation.

Under case law, if a measure has the object or the effect of abusing the dominant position, that is sufficient for Article 82 to apply.

In a given market, an actor is in a dominant position if its economic power is such that it can prevent competition from appearing and generally act without worrying about the behaviour of its competitors, customers or consumers¹¹⁰. Market share calculations indicate a

¹⁰⁹ Art. 84 of the Treaty consists of a transitional law provision that left signatory states certain powers to with regard to competition until the Commission was able to acquire them.

¹¹⁰ *United Brands v. Commission*, [1978] RCE 207.

dominant position, but other factors, such as major barriers to market entry¹¹¹, are also taken into account. It is also recognized that an oligopoly formed by independent firms can hold a dominant market position¹¹². Whereas these criteria are not very different from Canadian ones, the European authorities appear more disposed to acknowledge the presence of a dominant position.

Unfair behavior is noted objectively, even without proof of an intention to act unfairly¹¹³. Unfair pricing or contract requirements can indicate abuse, as well as mergers structurally affecting the market to a sufficient degree¹¹⁴. In fact, the variety of behaviours deemed “unfair” over the years by the Commission and the courts is remarkable¹¹⁵.

The Commission is endowed with vast investigatory powers and broad jurisdiction. The European Council has also given it an effective weapon: When it finds that an anti-competitive act has been committed deliberately or by negligence, it can not only order the guilty company to cease that activity, but also levy a fine of up to 10% of its sales figure¹¹⁶.

viii) Summary

In its current state, it is doubtful that Canadian competition law can play a useful role in repressing practices unduly hindering customer migration in the area of telecommunications. To difficulties related to the nature of prohibited behaviours are added procedural difficulties: It takes a lot of time to apply the mechanism established by Section 79 of the *Competition Law*. Unfair practices have plenty of time to weaken or even evict competitors or cause other prejudice before a decree can be issued to correct the situation¹¹⁷.

The industry itself recognizes the shortcomings of Canadian legislation with regard to abuses of dominance: A coalition of the major cable operators made extremely critical comments about the draft information bulletin, to the effect that the framework is *unworkable and incapable of effectively curbing abuses of dominance*¹¹⁸, and concluded that an in-depth reform of the legislative framework is necessary.

¹¹¹ By “barriers to market entry” we mean factors that reduce the possibility of a potential competitor from being interested in a market. Whish, Richard. *Competition Law*. 5th Edition. London, Lexis-Nexis Butterworths, 2003. 989 p. Pp. 183-186.

¹¹² *Ibid.*, p. 191.

¹¹³ *Hoffmann-La Roche v. Commission*, [1979] RCE 461.

¹¹⁴ *Europemballage Corp. and Continental Can Co. Inc. v. Commission*, [1973] RCE 215.

¹¹⁵ Whish, *op. cit.*, pp. 195-207.

¹¹⁶ European Council. *Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, OJ L 1/1 of 4.1.2003. This ceiling is set by sec. 23, subsec. 2 of the Regulation, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:EN:PDF>.

¹¹⁷ See in this regard Eckert, Andrew. *Predatory Pricing and the Speed of Antitrust Enforcement*. (2002) *Review of Industrial Organization* 20: 375-383.

¹¹⁸ Comments of Cogeco Cable Inc., Quebecor Media Inc., Rogers Communications Inc., and Shaw Communications Inc. on the Competition Bureau's draft information bulletin on the abuse of dominance provisions as applied to the telecommunications industry. s.l., January 12, 2007. 17 p.

The task force on the regulatory framework of telecommunications had recommended that questions of competition regarding these markets be entrusted to an expert organization rather than the Competition Bureau and Tribunal. Its conclusions still appear legitimate¹¹⁹.

Moreover, ambiguities persist in delimiting the actions open to the Competition Bureau, with regard to markets the CRTC has decided not to regulate and those it still governs. The CRTC has only partially withdrawn from regulating certain markets, so it appears difficult to determine whether the Competition Bureau can intervene in them without hindrance¹²⁰.

By abstaining from regulating entire sections of the telecommunications industry, the CRTC has virtually made itself incapable of intervening in those sectors, and only the limited framework of Sections 78 and 79 of the *Competition Act* opens the door to any market intervention, which therefore is not to be expected in the short and medium term.

3 - THE RULES OF PRIVATE LAW

a) The federal context

Given that departure costs can be created by contractual mechanisms, those costs are subject to measures regarding the validity of contracts.

The field appears essentially unoccupied at the federal level. Parliament has not legislated regarding the issues of interest to us here (except by enacting the *Competition Act*) and nothing leads us to believe that it is planning to do so in the short term.

In the exercise of its jurisdiction over telecommunications service providers, the CRTC may impose terms and conditions in relations between provider and subscriber, and thus prohibit or regulate certain practices. Following an April 2007 government decree, the CRTC established the position of Commissioner for Complaints for Telecommunications Services (CCTS)¹²¹, with the mandate to “resolve complaints from individual and small business retail customers”¹²². The CCTS handles complaints about the local and long distance telephone, mobile telephone and Internet access services of providers registered with the organization¹²³. The commissioner has the power to grant wronged subscribers up to \$5,000 in compensation, notwithstanding limitation of liability clauses that may be included in service contracts¹²⁴.

¹¹⁹ See in this regard: Union des consommateurs. *Commentaires de l'Union des consommateurs portant sur le document s'intitulant "Ébauche du bulletin d'information sur les dispositions en matière d'abus de position dominante dans l'industrie des télécommunications" élaboré par le Bureau de la concurrence*. Montreal, January 12, 2007. 6 p. Available at www.bureaudelaconcurrence.gc.ca/epic/site/bc-cb-nsf/fr/02273f.html.

¹²⁰ As for the apprehensions of some competitors in this regard: QISPC, *op. cit.*, pp. 7-17, notably.

¹²¹ CRTC. *Telecom Decision CRTC 2007-130 – Establishment of an independent telecommunications consumer agency*. Ottawa, 20 December 2007.

¹²² *Ibid.*, § 1.

¹²³ Were members of the CCTS, on February 28, 2008: Bell Canada, Bell Aliant Regional Communications LP, Cogeco Cable Canada Inc., Rogers Communications Inc., Eastlink, MTS Allstream Inc., Saskatchewan Telecommunications, Telus, Vidéotron, Virgin Mobile Canada and Vonage Corporation Canada, i.e., 11 providers: www.ccts-cprst.ca/en/page/Membership.

¹²⁴ CRTC. *Telecom Decision CRTC 2007-130 – Establishment of an independent telecommunications consumer agency*. Ottawa, 20 December 2007, § 90 notably.

However, the CCTS's mandate excludes, among other things, issues of contractual terms and conditions (if only to examine whether a company is complying with contractual provisions), false advertising or "General operating practices not covered in customer contract terms or commitments"¹²⁵. Regarding such providers or those who don't register with the CCTS, the field therefore appears unoccupied.

Given the above, and the "double aspect" theory, provincial laws should in principle apply to the federal undertaking, as long as they don't infringe on an essential part of it; so we assume that the provisions we will examine in the following subsections are operative. We will focus in turn – albeit summarily – on the legal frameworks of Quebec, Ontario and Saskatchewan¹²⁶.

B) QUEBEC

Under Quebec law, contractual relations are mainly governed by the *Civil Code of Québec* (CCQ). The CCQ requires that good faith prevail in relations between the parties¹²⁷. Specific regulations apply to adhesion contracts (1379. A contract in which "the essential stipulations were imposed or drawn up by one of the parties, on his behalf or upon his instructions, and were not negotiable") and consumer contracts (1384. A contract "whose field of application is delimited by legislation respecting consumer protection", and that was reached between a natural person and another party, "who offers such property and services as part of an enterprise which he carries on").

There is no doubt that telecommunications service contracts are consumer and adhesion contracts.

Three CCQ provisions (1435 to 1437) cover respectively a contract's external clauses, illegible or incomprehensible clauses, and unfair clauses. All three may be invoked to free the subscriber or consumer from the effects of such a clause. These mechanisms might theoretically be invoked, for example, to strip the effects of contractual provisions that would impose departure costs.

The recourse may apply simply because of the form of the contractual provision under criticism: if it is found only in one different document of the contract, or if it is presented in a font so small as to be illegible, for example, it may be dismissed by the court. The recourse may also apply due to the clause's effect, "which is excessively and unreasonably detrimental to the consumer".

Quebec case law has barely begun to involve the scope of this recourse¹²⁸. Moreover, Quebec legislators adopted in 1978 the *Consumer Protection Act* (CPA)¹²⁹, four sections of which (8, 9, 12 and 13) seem particularly relevant here.

¹²⁵ CCTS. *Scope of our Mandate*. Available at www.ccts-cprst.ca/en/page/Scope.

¹²⁶ We limit ourselves here to substantive law, without attempting to do an inventory of measures that the competent authorities might take to conduct investigations or stop generic behaviours by an industry – measures such as the voluntary commitment framework established by Quebec legislation, and the order for compliance framework established by Ontario legislation.

¹²⁷ Sec. 6, 7, 1375 CCQ.

¹²⁸ For an analysis of this provision, see *Service aux marchands détaillants Itée (Household Finance) v. Option consommateurs*, 2006 QCCA 1319, §§ 74-83 for the reasons given by Judge Côté; and, although in obiter dictum, see *United European Bank and Trust Nassau Ltd. v. Duchesneau*, 2006

Sections 8 and 9 allow a consumer to demand the cancellation or reduction of provisions creating an excessive disproportion between the parties. A consumer's "excessive, harsh or unconscionable" obligation may then be reduced or cancelled.

CPA section 12 prohibits the merchant from requiring fees whose amount is not "precisely indicated in the contract"; it could be applied to controlling monetary departure costs.

Section 13 prohibits (except for credit contracts) "any stipulation requiring the consumer, upon the non-performance of his obligation, to pay costs other than the interest accrued." At first we might think that CPA section 13 could disallow penalties levied if the consumer cancels the contract. But in 1996, the Quebec Court of Appeal concluded that this provision did not disallow penalties¹³⁰.

An infringement of the CPA allows the consumer to obtain damages, including exemplary damages, in addition to the cancellation of certain clauses.

In principle, Quebec law thus provides powerful tools to consumers who want to avoid departure costs. However, these instruments are imprecise and have not been significantly tested in the field under study here.

Regarding contracts remotely entered into, the CPA establishes a specific framework that is noteworthy given the large number of telecommunications services to which consumers can subscribe by telephone or on the provider's Web site. Those rules oblige companies, before entering into a contract, to inform the consumer intelligibly, prominently and expressly about product or service features, prices and fees, applicable restrictions and terms, and conditions of cancellation, termination, etc. This information must also appear in the contract that the merchant has the obligation to send the consumer. Defaulting on these obligations gives a consumer the right to cancel the contract¹³¹.

C) ONTARIO

Ontario consumers can avail themselves, in principle, of *common law* regulations on the validity of contract provisions and specific legislative measures.

Without drawing an inventory of the means that *common law* provides to parties who consider themselves wronged, we can at least mention the general concept of *unconscionability*, whereby the courts can refuse to apply a contract provision that appears unfair or that has been imposed by a party whose behavior has not been in good faith¹³².

The rule covers obligations that are unreasonable in nature or scope. An imbalance between the parties' obligations may result from subjective factors such as the wronged party's disability or illiteracy, but it may also be recognized by the courts upon simple examination of the contract's objective imbalance, even in the absence of either party's

QCCA 652 (C.A.), §§ 65-82. In both cases, the court of appeal refused to conclude that the clauses objected to were unfair.

¹²⁹ R.S.Q., v. P-40.1.

¹³⁰ *Dubreuil v. D.K. Automobile Inc.*, [1996] R.J.Q. 1144 (C.A.).

¹³¹ Consumer Protection Act, R.S.Q., v. P-40.1, sec. 54.4, 54.7, 54.8

¹³² Fridman, G.H.L. *The Law of Contract*. Fourth Edition. Student Edition. Toronto, Carswell, 1999. 895 p. P. 343.

particular vulnerability¹³³. The scope of *unconscionability* is not easy to define, and the courts' indications have at times been less than perfectly coherent in this regard, thus eliciting strong criticism from many commentators. As an author wrote regarding American law, which resembles Canadian law in this respect:

*Since unconscionability is a doctrine that affords judges with great power but poor guidance, leaving its development to judicial discretion leads to unprincipled and non-unified decision-making.*¹³⁴

The *Business Practices Act*, inspired by this principle, prohibits anyone to engage in unfair practices, which include:

- *false, misleading or deceptive assertions;*
- *false assertions of a specific price advantage;*
- *assertions falsely claiming a representative's power to "negotiate the final terms" of a transaction;*
- *deceptive assertions about the rights, remedies or obligations involved in a transaction;*
- *assertions that fail to state a material fact;*
- *abusive assertions given the consumer's vulnerable situation;*
- *the conclusion of a transaction whose terms are so opposed to the consumer's interests as to be unfair.*¹³⁵

In the event of an unfair practice, the consumer can obtain the contract's cancellation, a reduction of his obligations, and damages, including exemplary damages¹³⁶.

The *Consumer Protection Act, 2002*¹³⁷ contains similar provisions. Also prohibited (sections 14 and 15) are false, misleading or deceptive assertions as well as abusive assertions, all defined in terms analogous to those of the *Business Practices Act* and associated with identical penalties. Moreover, section 5 of the *Consumer Protection Act, 2002* obliges a provider to disclose required information that is "clear, comprehensible and prominent"¹³⁸.

The *Consumer Protection Act, 2002* also establishes specific frameworks for remote and electronic agreements. Such frameworks may apply for instance when a consumer subscribes to a telecommunications service through the provider's Web site. The company has pre-contractual disclosure obligations as soon as the amount payable by the consumer exceeds \$50¹³⁹. Those obligations include prices, fees and, in the case of an open-ended contract, the amount and frequency of instalments¹⁴⁰. This information must also be contained in the contract, of which the consumer must receive a written copy. Absent a pre-contractual disclosure complying with these requirements, the consumer may cancel within

¹³³ *Ibid.*, pp. 343-354.

¹³⁴ Becher, Shmuel. *Asymmetric Information in Consumer Contracts: The Challenge That is Yet to be Met*. To appear in [2008] 45 Am. Bus. L.J. Our footnote omitted. Consulted at: <http://ssrn.com/abstract=1016010>. The quotation is from p. 48.

¹³⁵ R.S.O. 1990, v. U.2, sec. 2-3.

¹³⁶ *Ibid.*, sec. 4.

¹³⁷ S.O. 2002, v. 30, ann. A.

¹³⁸ *Ibid.*, sec. 5.

¹³⁹ *Ibid.*, sec. 37, 38 and 44; *General Provisions*, Ontario Reg. 17/05, as amended, sec. 31 and 36.

¹⁴⁰ *General Provisions*, *op. cit.*, sec. 32 and 37.

seven (7) days of entering into the electronic or remote agreement, and he may cancel it within twelve (12) months following its conclusion if he has not received a written copy¹⁴¹.

D) SASKATCHEWAN

The nature of *common law* implies that our general observations about Ontario also apply to the legal framework in Saskatchewan. This province has also legislated to protect consumers¹⁴². Amendments to the *Consumer Protection Act*¹⁴³ came into effect on October 15, 2007.

The *Consumer Protection Act* prohibits unfair practices in terms similar to those of Ontario. Included in such practices are behaviors that exploit the vulnerability of consumers, or constitute false or misleading assertions, or suggest that a representative has a degree of authority he doesn't actually have, or contain omissions of important facts or clauses creating excessively asymmetric contractual obligations¹⁴⁴. Committing a dishonest act can lead to contract cancellation or a reduction in consumer obligations, as well as damages including exemplary damages¹⁴⁵.

When he deems it in the public interest, the *Director* named to administer the Act has the power to file a suit on behalf of a wronged consumer¹⁴⁶, which can prove particularly useful in cases where many consumers are victims of the same practices or where production of evidence would impose an excessive burden on a consumer.

The Act also contains sections regulating contracts entered into on the Internet (75.5 - 75.82), executory contracts (76.10 - 76.20) and remote contracts (76.70 - 76.80). The framework for Internet contracts requires the provider to disclose clearly and comprehensibly the information prescribed by regulation and to send the consumer a personalized copy of the contract within 15 days following its conclusion. Should the company fail to disclose the prescribed information, the consumer can demand the contract's cancellation within 30 days following its conclusion. The framework for remote contracts is quite similar to that for Internet contracts.

With regard to contracts whereby the parties do not execute their obligations instantly at the moment of conclusion and whose value exceeds a level set by regulation, sections 76.10 ss. require the contract to be evidenced in writing and to contain the information prescribed by regulation; failing which, the consumer may notably, during the year when the contract is entered into, demand its cancellation.

The province's leading telecommunications provider, Sasktel, is a Crown corporation whose activities are governed by two specific laws¹⁴⁷. However, those laws contain no provision for the company's business practices that is relevant to this study.

¹⁴¹ *Act of 2002...*, *op. cit.*, sec. 40, 47.

¹⁴² Saskatchewan has also passed an *Unconscionable Transactions Relief Act*, S.S. 1978, v. U-1., but it only applies to money-lending operations.

¹⁴³ *Consumer Protection Act* S.S. 1996, v. C-30.1.

¹⁴⁴ *Ibid.*, sec. 6.

¹⁴⁵ *Ibid.*, sec. 16.

¹⁴⁶ *Ibid.*, sec. 15.

¹⁴⁷ *Saskatchewan Telecommunications Act*, R.S.S. 1978, v. S-34; *Saskatchewan Telecommunications Holding Corporation Act*, S.S. 1991, v. S-34.1.

B - Comparative Law

If markets in other jurisdictions are in situations analogous to those in Canada, they may be regulated in a way that might be an example to us. In that vein, we will summarily examine a few aspects of comparative law.

1 - THE UNITED STATES

A) COMPETITION LAW

In principle, competition falls under federal jurisdiction. The federal legal framework is applied to a small number of general provisions, but there are also specific regulations, which cover bank mergers more specifically, for example. Even the general framework is administered by two entirely distinct entities – the Justice Department (or Attorney General) and the Federal Trade Commission (or FTC), an independent body reporting to the Commerce Secretary¹⁴⁸. To those regulations is added a great deal of case law. What follows is only a brief overview of the American framework.

The general framework for American competition law rests mainly on three legal provisions: sections 1 and 2 of the *Sherman Act*, which prohibit monopolies or any act that might restrict trade or commerce (“restraint of trade or commerce”) between the United States and other countries, and section 7 of the *Clayton Act*, to the same effect for domestic operations.

Sections 2 and 3 of the *Clayton Act* also prohibit abuses of market dominance, notably price discrimination and refusal to sell to competitors¹⁴⁹.

The very general nature of these prohibitions is noteworthy. Case law has distinguished between two types of situations: those where there is a prohibition “per se”, virtually regardless of the circumstances, and those involving a circumstantial analysis based on a *rule of reason*¹⁵⁰. Prohibited *per se* is price fixing, market-sharing collusion, boycotting, and tie-in sales or similar operations. However, the doctrine and case law are becoming more and more hesitant as to the rigor of this classification.

The practices repressed by the *Sherman Act* are subject to sanctions including fines of up to \$10 million. The FTC may demand an injunction to stop a violation of provisions of the *Sherman Act*¹⁵¹ or of its empowering legislation (which also prohibits various anti-competitive practices), as may private complainants if they demonstrate sufficient interest, and thus standing to appear¹⁵².

The prohibitions are not only penal: they may also lead to civil remedies, of which the best-known is established by section 4 of the *Clayton Act*. From 1970 to 1995, more than 90% of lawsuits against anti-competitive activities in the United States have reportedly been private

¹⁴⁸ Information about FTC powers can be found at www.ftc.gov/ftc/antitrust.htm.

¹⁴⁹ 15 USC §§ 12-13.

¹⁵⁰ *Northern Pacific Ry. v. United States*, 356 US 1, 5 (1958); *Standard Oil Co. v. United States*, 221 US 1 (1911); *Continental TV Inc. v. GTE*, 433 US 36 (1977).

¹⁵¹ 15 USC § 45.

¹⁵² 15 USC §§ 15, 15a, 26; *Ass. Gen. Contractors v. California State Council of Carpenters*, 459 US 519 (1983) among others.

rather than public¹⁵³. To the extent that a company violates competition regulations in a manner relatively prejudicial to a competitor or any other person, the victim can thus launch a civil lawsuit against the offender and claim compensation equivalent to triple the damages proven. Companies accused in the United States of engaging in anti-competitive practices are fearful of those civil sanctions, which can be ruinous.

American competition law therefore differs in several important respects from Canadian law. Illegal practices are defined there in less restrictive terms, penalties and other sanctions can prove clearly more onerous or coercive, and private complainants can more easily attack anti-competitive activities. Accordingly, lawsuits are more frequent and anti-competitive practices more vulnerable.

B) PRIVATE LAW

The United States (with the notable exception of Louisiana) has *common law* jurisdictions¹⁵⁴. Regulations regarding *unconscionability* are thus found there, and even codified to a certain extent. For example, the *Restatement of Contracts* specifies that:

*Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.*¹⁵⁵

As a result, a party to the contract cannot abuse the ignorance of his contracting partner regarding the scope of the agreement. Subsection 208 of the *Restatement* makes a contract's *unconscionable* provisions unenforceable, as does subsection 2-302 of the *Uniform Commercial Code*, which, like the rest of this model law, has inspired the laws of several states.

C) REGULATORY ACTIVITY

In 1993, Congress made competition a fundamental principle of the telecommunications policy regarding mobile telephony¹⁵⁶. In 1996, the *Telecommunications Act*¹⁵⁷ imposed on territorial providers the obligation to give competitors access to the local loop. Internet services, on the other hand, have never been regulated as to market access or pricing.

According to theorists, opening markets to competition should lead to a proliferation of providers and the elimination of the regulatory burden; subscribers' interests would be preserved by competitors who would naturally choose to fashion the offer so as to maintain their clientele. In fact, we have witnessed market concentration and the growth of oligopolies that marginalize the competition. In some niches, consumer dissatisfaction has reached a peak.

¹⁵³ Roberts, R. Jack. *International Comparative Analysis of Private rights of Access – A Study Commissioned by Industry Canada – Competition Bureau*. Toronto, R.J. Roberts & Associates, s.d. P. 126. The text is found at

<http://strategis.ic.gc.ca/pics/ct/roberts-e.pdf>. The reference period is specified on p. 134.

¹⁵⁴ Even though California has had a *Civil Code* since 1872, which is actually a codification of common law regulations.

¹⁵⁵ *Restatement (Second) of Contracts* § 211 (3). The *Restatement*, whose current edition was completed by the American Law Institute in 1979, constitutes an informal codification of contractual law.

¹⁵⁶ *Omnibus Budget Reconciliation Act of 1993*, Pub. L. 103-66, Title VI, § 6002 (b), quoted in CMRS, *op. cit.*, p. 11.

¹⁵⁷ *Telecommunications Act of 1996*, P.L. 104-104.

Former monopolies argued that some new competitors were competing by building their own infrastructures, so that incumbents need not be forced to make their own facilities available to competitors. The courts agreed¹⁵⁸.

That decision had a major impact. The competitors threw in the towel and scurried to relatively marginal market shares or were swallowed up by local incumbents, which in turn bought each other up. In 2008, the market is not very different from the one that had provoked the ire of anti-competition authorities before 1984. Citizens invoked federal competition provisions in an attempt to correct the situation, and met with failure¹⁵⁹.

These market developments did not convince the federal authorities to consider issues of customer mobility. But the states reacted otherwise.

For example, the California Public Utilities Commission reached in September 2003 an agreement with the mobile telephone service company Cingular to end a long legal dispute and have the company reimburse early contract cancellation penalties imposed between 2000 and 2002 and totalling about \$18 million, and pay administrative penalties of more than \$12 million¹⁶⁰.

Moreover, in 2004 the Californian regulatory body enacted a regulation obliging mobile telephone service providers to grant their subscribers a 30-day trial period, during which they could terminate a contract without incurring a penalty¹⁶¹. The California legislature considered legislation to establish such a trial period, but the bill has been dormant since November 2006¹⁶².

It is plausible that such regulatory threats helped convince AT&T to announce in October 2007 that penalties for canceling a mobile telephone service contract would be graduated according to the period remaining in the contract. The next month, Sprint Nextel and T-Mobile also announced that they would replace fixed penalties with graduated ones. The providers also changed their policies so that a contract amendment no longer requires that the entire contract be renewed for the same term as initially¹⁶³.

American consumers, fed up with certain practices, notably penalties for early contract cancellation, have sometimes acted on their own: class action suits have been launched, at

¹⁵⁸ *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied sub nom. NARUC v. United States Telecom Association*, Orders No. 04-12, 04-15 & 04-18 (USSC).

¹⁵⁹ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

¹⁶⁰ California Public Utilities Commission. *PUC settlement requires Cingular Wireless to refund early termination fees to certain customers*. San Francisco, press release, March 15, 2007, available at http://docs.cpuc.ca.gov/published/News_release/65619.htm.

¹⁶¹ However, this measure's application was suspended in 2005 and was abrogated in 2006. California Public Utilities Commission. *Memorandum*, April 5, 2006. Available at <http://docs.cpuc.ca.gov/Published/Reports/55003.htm>.

¹⁶² We have not examined the laws of the 49 other States in this regard.

¹⁶³ CMRS, *op. cit.*, pp. 56-57.

least one of which was authorized in California in June 2006¹⁶⁴. However, that file does not appear to have progressed significantly.

2 - THE UNITED KINGDOM

A) COMPETITION LAW

The British competition framework was to an extent the ancestor of ours. But that parental link was broken when the United Kingdom proceeded in 1998 and 2002 to an in-depth reform. The adoption of the *Competition Act* in 1998 ended a very long consultation process marked by the growing frustration of most stakeholders¹⁶⁵.

The *Competition Act 1998* grants considerable powers to the *Office of Fair Trading* (OFT), which was completely restructured¹⁶⁶. The OFT, which has broad investigatory powers and the authority to issue decrees and impose penalties¹⁶⁷, can receive complaints from any person, but it can also receive *supercomplaints* from consumer protection organizations assigned by decree when they deem that:

*[...] there is any market feature, or combination of features, such as the structure of a market or the conduct of those operating within it, that is or appears to be significantly harming consumers.*¹⁶⁸

Also assigned by decree are the *Consumers' Association*, the *National Consumer Council*, *Citizens Advice*, *Energywatch* and *Watervoice*¹⁶⁹. Because consumers don't generally have the resources required to analyze market operations and file a complaint, associations are allowed, even though they are not victims themselves, to act in the interest of consumers.

B) REGULATORY ACTIVITY

i) Ofcom's concerns

Ofcom, the administrative organization charged with regulating the sector (even deregulated) of telecommunications, is actively interested in the issues of the present study. Given industry practices that worried the public and Parliament in 2007, Ofcom initiated a consultation process that led to a host of recommendations, themselves submitted to a public consultation beginning on February 28, 2008¹⁷⁰. We will examine the issues of contract term, cancellation penalties and minimum cancellation periods – issues that don't

¹⁶⁴ AARP California. *Court Allows Early-Cancellation Fee Suit Against Cell Phone Providers*. Oakland, June 12, 2006. Press release available at <http://community.aarp.org/n/pfx/forum.aspx?tsn=1&nav=message&webtag=rp-ca&tid=111>.

¹⁶⁵ Whish, *op. cit.*, pp. 306-308.

¹⁶⁶ Some powers are also assigned to sectoral regulatory bodies; we will not discuss this here.

¹⁶⁷ The amount is virtually identical to that set by the European Union Council regulation mentioned above, i.e., 10% of the annual sales figure, although the British ceiling takes into account the company's sales figure in the United Kingdom, rather than worldwide as does the ceiling set by the European regulation.

¹⁶⁸ Department for Business Enterprise & Regulatory Reform. *Super-Complaints*, at www.dberr.gov.uk/consumers/enforcement/super-complaints/page17902.html.

¹⁶⁹ *Ibid.*

¹⁷⁰ Ofcom-review, *op. cit.*

generally preoccupy consumers when they sign a contract, but that can prove very important later on¹⁷¹.

Ofcom's recommendations are directly inspired by the European Union's 1993 directive regarding unfair clauses¹⁷², and have been transposed to the United Kingdom by the *Unfair Terms in Consumer Contracts Regulations 1999*¹⁷³. The purpose of these regulations is to ensure that contractual terms and conditions that were not freely negotiated by the parties are transparent and fair¹⁷⁴.

The British legal framework regarding unfair clauses distinguishes between two categories in the terms and conditions of a contract: core and more peripheral ones. The former, regulating essential contract terms and written in clear language, are not regulated¹⁷⁵, since the consumer is capable of making informed choices in that regard. Clauses not written in clear language, as well as peripheral ones, are subjected to a *fairness test*¹⁷⁶: Significant imbalance in the parties' obligations under a subscription contract's provision (regardless of the core provisions) is deemed unfair and null¹⁷⁷. It is also presumed that clauses whose object or effect is to impose disproportionate penalties for contravening a contract or to automatically renew a contact unless the consumer expressly opposes it are unfair¹⁷⁸.

Ofcom recognizes the existence of a manifest link between issues of competition and consumer protection¹⁷⁹, and that practices lacking in transparency may skew the market¹⁸⁰. In that vein, Ofcom is notably concerned with ensuring that information is transparent enough to enable consumers to make informed choices. But transparency isn't always sufficient, since even informed consumers can underestimate the effects of certain clauses, the risk that those clauses may apply to them, etc.¹⁸¹ Ofcom's assumptions are in fact supported by a consumer survey conducted in 2007, indicating that less than half of consumers were aware that their contracts contained clauses establishing a minimum term, cancellation penalties and a minimum period before cancellation is allowed¹⁸².

OFCOM has concluded that, whereas some requirements imposed by providers appear justifiable to an extent, others don't and should be eliminated.

¹⁷¹ *Ibid.*, p. 4.

¹⁷² Council Directive 93/13/EEC of April 5, 1993, on unfair terms in consumer contracts, OJ L of 21.4.1993, p. 29-34.

¹⁷³ S.I. 1999/2083, as amended since. The regulation allows Ofcom to obtain an injunction or court order to stop prohibited behaviour.

¹⁷⁴ Ofcom-review, *op. cit.*, p. 11.

¹⁷⁵ *Ibid.*, p. 100.

¹⁷⁶ *Consumer Contracts Regulations 1999, op. cit.*, subsec. 5 (1). Under subsec. 5 (2), a prewritten contractual term *shall always be regarded as not having been individually negotiated*.

¹⁷⁷ *Ibid.*, sec. 8.

¹⁷⁸ Ofcom-review, *op. cit.*, p. 101.

¹⁷⁹ *Ibid.*, p. 12.

¹⁸⁰ *Ibid.*, p. 15.

¹⁸¹ *Ibid.*, p. 13.

¹⁸² *Ibid.*, p. 14. The sole exception: 70% of Mobile telephony subscribers were aware that their contract contained a term clause.

ii) Contract term and penalties

OFCOM first considered the problem of the term of initial contracts, with the provider frequently imposing an initial fixed-term contract. Ofcom also observed that this requirement is all the more common if the provider offers its new customer an advantage such as a “free” or discounted telephone, or free installation: the company plans of course to amortize the “gift” over the term of the contract and recover the value with the monthly payments¹⁸³. The cancellation penalty is generally equivalent to the total balance of remaining payments. It happens that the consumer is required to pay an amount greater than that balance, whereas other providers cap the penalty or set it at the lowest monthly rate in their schedule¹⁸⁴.

According to Ofcom, nothing justifies a provider in imposing, to a consumer cancelling a contract, a penalty greater than the amount of remaining monthly payments. And nothing justifies a provider in finding itself, after cancellation, in a financial situation more favourable than otherwise. The value of penalties must therefore take into account the costs avoided by the provider because of the cancellation, for example the local line access charge or the value of the transmission capacity freed up in the network by a customer’s departure¹⁸⁵.

To ensure that the consumer can make an informed decision, Ofcom also requires providers to tell a subscriber, when he expresses a desire to cancel the contract, what penalty would be imposed.

iii) Renewals

Ofcom notes that whereas the initial fixed-term contract is generally replaced at maturity by an open-ended contract, there are also situations where another fixed-term contract, assorted with cancellation penalties, succeeds the original contract. As for amendments to the contract, the organization gives the example of address changes resetting the age of the contract to zero. It is also noted that information about such practices is sometimes nowhere to be found¹⁸⁶.

According to Ofcom, company costs resulting from contract amendments are minimal in many cases and so don’t justify draconian obligations¹⁸⁷. Observing that some of the providers’ behaviours cannot plausibly be governed by market forces alone, Ofcom orders that facts likely to set a new contract term can easily be known to the consumer, that a new term cannot be established unless it is to the consumer’s advantage and the provider is incurring extra costs that must be recovered, that eventual penalties are fair in that event, and that the contract term cannot be extended simply because a subscriber requests a change to his package or bundle at little or no expense to the provider¹⁸⁸.

iv) Prior notices

Not only do many fixed-term contracts impose penalties for premature cancellation, but open-ended contracts often require the subscriber to give prior notice to cancel his agreement. Such prior notices are most often of one month, during which the consumer must continue to pay for his service even though he no longer wants it. This is evidently a

¹⁸³ *Ibid.*, pp. 61-62.

¹⁸⁴ *Ibid.*, p. 53.

¹⁸⁵ *Ibid.*, pp. 65-68.

¹⁸⁶ *Ibid.*, pp. 71-72.

¹⁸⁷ *Ibid.*, p. 74.

¹⁸⁸ *Ibid.*, p. 75.

departure cost, and more than 40% of polled respondents stated that one month's prior notice constitutes a dissuasive factor in the decision to change providers¹⁸⁹.

According to Ofcom, the period for giving a prior notice of cancellation should never exceed what is actually necessary to settle the required formalities: a month is generally excessive, so the prior notice is an unjustifiable departure cost¹⁹⁰.

3 - FRANCE

A) THE REGULATORY FRAMEWORK

France proceeded to an in-depth reform of telecommunications regulations in 1996¹⁹¹, which had been made necessary by changes in community law¹⁹² that opened French telecommunications markets to competition. The sector is now largely governed by the *Code des postes et des communications électroniques*, which guarantees access to basic universal service and the freedom to practice electronic communications activities. The framework is the responsibility of the Autorité de régulation des communications électroniques et des postes (ARCEP), whose mandate includes ensuring effective and fair competition between network operators and service providers, as well as a high level of consumer protection, notably thanks to information, rates and terms of use that are clear and transparent¹⁹³. That body is thus responsible for monitoring all operators of electronic networks and communications services, including Internet access providers and cable companies, and must favour the emergence of competitors to the providers that historically hold monopolies¹⁹⁴.

Two other legal sources are added to ARCEP's jurisdiction. On one hand, the Conseil de la concurrence keeps its general authority in applying competition regulations, thus complementing ARCEP. On the other hand, the *Code de la consommation* contains various provisions that are particularly relevant to this study. We will discuss those provisions below, notably their recent amendments, but it should be noted that when the latter were adopted, ARCEP declared itself in favour of legislative amendments to improve, particularly by regulating certain departure costs, the ability of consumers to provoke competition¹⁹⁵.

¹⁸⁹ *Ibid.*, pp. 77-78.

¹⁹⁰ *Ibid.*, pp. 80-81.

¹⁹¹ *Loi no 96-659 du 26 juillet 1996 de réglementation des télécommunications.*

¹⁹² And notably by the adoption of *Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets*. Other directives adopted since 2002 have also helped transform the sector in European Union member states; for example, *Directive 2002/21/EC of the European Parliament and of the Council, of 7 March 2002 - on a common regulatory framework for electronic communications networks and services (Framework Directive)*, OJ 24.4.2002, L108/33, and the *Directive 2002/22/CE of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive)*, OJ 24.4.2002, p. L 108/51.

¹⁹³ *Code des postes et des communications électroniques*, sec. L32-1. (Version in effect in February 2008) www.legifrance.gouv.fr.

¹⁹⁴ Senate, *op. cit.*, p. 22.

¹⁹⁵ ARCEP. *Avis n° 06-0847 de l'Autorité de régulation des communications électroniques et des postes en date du 7 septembre 2006 sur trois articles du projet de loi en faveur des consommateurs et relatifs au secteur des communications électroniques*. Paris, September 7, 2006. 11 p. P. 2. The opinion is found at www.arcep.fr/fileadmin/uploads/tx_gsavis/06-0847.pdf. While vigorously

In effect, French legislative amendments compel collaboration between ARCEP and the Conseil de la concurrence, with the former having to obtain the latter's view regarding certain decision-making processes. For its part, the Conseil de la concurrence recognizes that certain aspects of the telecommunications sector justify at least a temporary maintenance of specific regulations, established by a sectoral regulator and differing slightly from general competition law¹⁹⁶.

The Conseil de la concurrence has concluded, among other things, that telecommunications markets are subject to specific regulations when three cumulative criteria combine:

- *there are barriers to market entry or other impairments to the development of competition;*
- *there is a lack of dynamic competition; and*
- *the general provisions of competition law cannot alone remedy the situation.*¹⁹⁷

We cannot here draw a complete inventory of measures established by ARCEP and the Conseil de la concurrence in recent years¹⁹⁸. But we can mention the close and respectful collaboration between them, in a context where French competition law (analogous to European law) ensures more effective protection than Canadian law with respect to market dominance, and where the authorities, particularly ARCEP, remain strongly concerned about the need to regulate the market in order to ensure its good operation and protect consumers adequately.

Finally, several French measures of interest to us here constitute a transposition of European directives, particularly the one called "universal service", which requires among other things that contracts entered into with consumers specify the term of the contract as well as the terms and conditions for renewing and terminating services and contracts¹⁹⁹. Subscribers also have the right to cancel the contract as soon as the provider plans to change its terms and conditions, which it cannot do without giving prior notice of at least one month²⁰⁰.

supporting the principle of measures regulating the minimum term of contracts, the ARCEP issued recommendations for technical amendments to the proposed texts.

¹⁹⁶ An explanation of this Council position is found in Conseil de la concurrence. *Avis n°04-A-17 du 14 octobre 2004 relatif à une demande d'avis présentée par l'Autorité de Régulation des Télécommunications en application de l'article L. 37-1 du code des postes and communications électroniques*. Paris, October 14, 2004. 17 p. The "Autorité" named in the title preceded the ARCEP. Available at www.conseil-concurrence.fr/pdf/avis/04a17.pdf.

¹⁹⁷ Those regulations, developed as of 2005, are repeated for example in Conseil de la concurrence. *Avis n° 07-A-05 du 19 juin 2007 relatif à une demande d'avis de l'Autorité de régulation des communications électroniques and des postes (ARCEP) dans le cadre de la procédure d'analyse du marché de gros de la terminaison d'appel vocal sur les réseaux mobiles*. Paris, June 19, 2007. 8 p. P. 5. The opinion can be consulted at www.conseil-concurrence.fr/pdf/avis/07a05.pdf.

¹⁹⁸ The Conseil de la concurrence alone has issued 74 decisions and opinions regarding telecommunications since 2000. But most of those actions concern wholesale markets rather than behaviours directly affecting consumers or involving departure costs.

¹⁹⁹ *Directive 2002/22/EC, op. cit.*, art. 20 2 e).

²⁰⁰ *Ibid.*, art. 20 4.

B) PRIVATE LAW

Among the determining aspects of the *Code de la consommation* is the regulation of unfair clauses²⁰¹.

i) Unfair clauses

Clauses considered unfair in a consumer contract are those whose object or effect is to create, to the consumer's disadvantage, a significant imbalance between the rights and obligations of the parties²⁰².

To this broad definition is added an annex to the *Code de la consommation*, to list certain types of clauses that *may* be considered unfair. The authorities may also determine by decree the clauses that *must* be considered unfair. Thirdly, the *Code de la consommation* established a Commission des clauses abusives, notably to recommend the amendment or suppression of clauses it deems unfair²⁰³.

Also prohibited under section R. 132-2 of the *Code de la consommation* is the unilateral amendment clause (except for amendment clauses as a result of technical progress, which are regulated). The annex assumes in particular the unfair nature of clauses whose object or effect is to secure the consumer's firm commitment in exchange for the merchant's discretionary commitment, disproportionately high default penalties, the merchant's sole discretionary right to cancellation, a right to cancellation without reasonable prior notice from the company, automatic extension in the absence of the consumer's expression to the contrary, a unilateral amendment right without valid reason specified in the contract, etc.

Also noteworthy are recommendations that were formulated on February 15, 2007 by the Commission des clauses abusives with regard to contracts related to certain Internet bundles – Internet, telephony, television – and that illustrate well the practices prevailing on French territory²⁰⁴. Upon examination of contracts concluded in the market, the Commission notes nineteen (19) types of clauses that are unfair in its view. In particular, it mentions provisions that oblige consumers to upgrade their hardware or software, that allow providers to change, without prior information, the content of proposed services, and that force the consumer to send prior notice of contract cancellation before the fifteenth day of the month if he wants to be disconnected by the end of the month. The last two types of provisions limit consumer mobility somewhat, and the first type imprisons consumers in contracts whereby they won't receive the services expected.

²⁰¹ Chatriot, Alain. *Qui défend le consommateur? Associations, institutions et politiques publiques en France (1972-2003)*. In Chatriot, Alain; Chessel, Marie-Emmanuelle; Hilton, Matthew, dir. *Au nom du consommateur – Consommation et politique en Europe et aux États-Unis au XX^e siècle*. Coll. L'espace de l'histoire. Paris, Éditions La Découverte, 2004. 424 p. Pp. 176-177.

²⁰² *Code de la consommation*, art. L. 132-1. This article concerns public policy.

²⁰³ *Code de la consommation*, art. L. 132-4.

²⁰⁴ Commission des clauses abusives. *Recommandation n°07-01 relative aux contrats proposant aux consommateurs les services regroupés de l'Internet, du téléphone et de la télévision ("triple play")*. Paris, February 15, 2007. 6 p. Available at www.clauses-abusives.fr/recom/07r01.htm.

ii) Terms and penalties

The *Code de la consommation* was amended in early 2008 to grant specific rights to subscribers of telecommunications services²⁰⁵. Clearly concerned about issues of contract term and early cancellation penalties, the legislators have prohibited contracts longer than 24 months and regulated those longer than 12 months: The provider is obliged to simultaneously offer a contract of twelve months or less under non-disqualifying business terms and conditions, and the merchant cannot impose, after the twelfth month, a cancellation penalty exceeding one-quarter of the amount that would remain to be paid until the end of the contract²⁰⁶. The provider can otherwise bill the consumer only the expenses it has actually incurred due to the cancellation, so long as those expenses are specified in the contract and duly justified²⁰⁷.

The merchant also cannot set a long period for the consumer's prior notice of cancellation; the maximum period is set at ten days²⁰⁸.

Contracts that are accessory to telecommunications service contracts are subject to the same regulations, which will come in effect on June 1, 2008²⁰⁹.

²⁰⁵ *Loi no 2008-3 du 3 janvier 2008 pour le développement de la concurrence au service des consommateurs*. JO N January 4, 2008, p. 1. The text can be consulted at www.legifrance.gouv.fr.

²⁰⁶ *Code de la consommation*, art. L. 121-84-6

²⁰⁷ *Code de la consommation*, art. L. 121-84-7

²⁰⁸ *Code de la consommation*, art. L. 121-84-2

²⁰⁹ *Ibid.*, art. 20.

V- BARRIERS TO MIGRATION IN CANADA

Difficult as they are to quantify, we know that departure costs can be remarkably high²¹⁰. Retaining customers is not in itself an illegitimate business objective²¹¹: For instance, it can justify efforts to maintain a high level of goods or services. Generally, though, economic models indicate that significant departure costs tend to increase prices and reduce market efficiency²¹². Relatively low customer fluidity, and prices higher than those of a truly comparable reference market, are indicators of excessive departure costs²¹³. Substantial variances between the prices of a dominant competitor and those of its more-aggressive rivals suggest unfair practices²¹⁴.

Given the significant departure costs, market prices may be higher than they should be. The ability of competitors to enter the market may be diminished, and if they do so their behaviour may be less aggressive than it would be if they could also count on costs keeping their new customers captive. The nature of products offered may be less than optimal. In sum, an apparently strong rivalry does not guarantee a truly competitive and economically efficient market²¹⁵.

An analysis of the impact of departure costs on the actual level of competition in a market must be conducted with caution, take into account all market features, and rely on data that, unfortunately, are very often out of the public domain. It doesn't seem possible to evaluate with certainty the current soundness of telecommunications service markets, in the notable absence of relevant data. But our concern is still warranted and is shared in several other countries.

In Canada, two major types of barriers can hinder consumer migration from one telecommunications service provider to another: those resulting from insufficient competition and those from departure costs. Our research mainly examines the latter barriers, most of which are linked to the practices of providers.

We have also analyzed objective sources – the offers of a certain number of providers – as well as subjective sources – consumer perceptions and reactions. We will see that the trends generated by these two types of sources converge and lead to the conclusion that departure costs have an impact on Canadian markets.

A - DEPARTURE COSTS IN CANADA

We will now proceed to a first inventory of departure costs detected in Canadian markets. Given the number and dynamics of those markets, it was not possible, within the limits of this study, to draw an exhaustive list of those costs. What follows serves therefore as an illustration. It appears eloquent to us.

²¹⁰ For example, it is estimated that in Israel's mobile telephony market, departure costs are equivalent to the price of a telephone. See: Shy, *op. cit.*, quoted in Farrell, *op. cit.*, p. 1980.

²¹¹ AARP, *op. cit.*, p. 2.

²¹² Farrell, *op. cit.*, pp. 1974, 1990.

²¹³ Nasse, *op. cit.*, p. 11.

²¹⁴ *Ibid.*, p. 12.

²¹⁵ Farrell, *op. cit.*, p. 2006.

1 - INFORMATIONAL COSTS

A) RESEARCH COSTS

By “research costs” is meant those involved in obtaining, comparing and analyzing market supply data. The more difficulty the consumer has obtaining or understanding supply information, the more efforts he needs to make an informed choice, and the higher his research costs climb. The costs may be monetary, such as transportation or printing costs; or they may involve the time spent understanding local market conditions. And the higher the research costs, the less efficient the market, and the more consumers are tempted to fall into inertia.

We’ve made an inventory of certain offers from the main Canadian providers, in 13 local markets in 3 provinces and 3 services – wired telephony, mobile telephony, and high-speed Internet access²¹⁶. The amount of work required for this examination speaks to the complexity of the markets. A few cautionary notes are necessary before our examination.

First, we haven’t made an exhaustive inventory of all providers. In particular, we haven’t considered the offers of mobile telephony resellers, nor made an exhaustive inventory of all Internet access providers. In certain markets, however, we’ve included a provider not associated with a major telecommunications service group, for purposes of comparison.

The data were entered in early March 2008. Except for mentions to the contrary, we have focused on information available on company Web sites, which sometimes offer discounts online that are unavailable in other sales networks²¹⁷.

We haven’t repeated all the offers from the providers identified, but have limited ourselves to basic wired services, mobile telephony packages of about \$20 per month, and the most frequent options for high-speed Internet. The scope is already immense; an exhaustive inventory would have greatly exceeded the framework of this study, without in our view shedding significantly more light. This is thus a sample.

Here is an example of the challenges faced by consumers in these markets. A Montreal resident who wants to use a wired telephone, a mobile telephone and high-speed Internet, and who requires only a limited number of options, has to contemplate the panoply of the following offers:

²¹⁶ A summary of the territorial markets examined and of the suppliers listed for each service is found in Appendix 1.

²¹⁷ For example, among Rogers’ residential telephone offers, we find a “free \$20 credit when you order online”.

Table 1
Partial overview by some offers of leading providers

Bell Group	
Basic wired telephony ²¹⁸	\$29.95
Internet	\$29.95
Mobile	\$25.00
2-service bundle – wired + Internet ²¹⁹	\$52.89
2-service bundle – wired + mobile	\$47.94
2-service bundle – Internet + mobile	\$44.95
3-service bundle ²²⁰	\$72.89
Vidéotron Group	
Wired telephony, no options	\$22.95
Wired telephony, 2 options	\$28.95
Internet	\$27.95
Mobile	\$46.65
2-service bundle – wired + Internet ²²¹	\$47.90
2-service bundle – wired + mobile	\$51.60
2-service bundle – Internet + mobile	\$59.60
3-service bundle ²²²	\$73.55
Rogers Group	
Wired telephony, one option	\$29.95
Wired telephony, two options	\$33.95
Internet ²²³	\$34.95
Mobile ²²⁴	\$30.00
2-service bundle – wired + mobile ²²⁵	\$56.95

The combination of three providers offering three services yields a total of 27 possible permutations in the market. The data show that the services that cost less individually are wired telephony and Internet access from Vidéotron, and mobile telephony from Bell: total price, \$81.90. If Vidéotron's two offers are bundled and Bell's mobile telephony is added, we arrive at a total of \$72.90 – whereas Bell's bundle of these three services is offered at exactly... one cent less.

²¹⁸ The service includes 2 specific options: call display and visual call waiting.

²¹⁹ The price of wired service is reduced to \$24.95 in this bundle.

²²⁰ Basic telephone service, Total Essential Internet and Über 20 wireless. Offers compared at <http://bundle.bell.ca/en/qc/main/calculate-your-bundle>.

²²¹ Offers compared at www.videotron.com/services/en/forfaits/3_calcullette.jsp.

²²² This is presented as a savings of \$24 per month compared to the total price of individual services. As for the 4-service bundle, including cable television, it is offered for \$85.53.

²²³ This is the *Lite* plan; the *Ultra Lite* plan (at \$24.95 per month) allows only 2 gigabytes of monthly use.

²²⁴ This is the Canadian One Rate 150 Plan.

²²⁵ The bundle comparison tool on the Rogers site has certain limitations that make it very difficult to use. For this study, we applied here the rule established on the site: combining 2 services yields a savings of 5%. The comparison tool was also incapable of assembling bundles other than “wired + mobile” in Quebec; we could not reach a different conclusion.

However, this is a highly simplified comparison. Bell's Web page for bundling allows for combining four different wired telephone offers, four long distance offers, three Internet service offers and four mobile telephony offers. Even leaving out long distance telephony (and television broadcasting services), we arrive at 48 different permutations for a bundle of three services. An embarrassment of riches...

Then consumers are supposed to make a comparison with the bundles of competitors. For example, Bell's "basic" telephone service includes call display and call waiting, but no other options, whereas Vidéotron's two options cost \$6 but allows for choosing the options. A subscriber who wants to choose his service options at Bell must opt for the Selection package, which grants him five options for a monthly price \$5 higher than that of the basic package.

But in fact it gets more complicated: A Montreal resident can choose between five major mobile telephony providers – Fido and Telus in addition to the three already identified, not counting resellers. Fido offers a basic package at a monthly cost of \$20 – to which are added network access fees of \$6.95 monthly, as mentioned in the small print. The offer, which at first seemed very competitive, suddenly becomes a little less so. Unless, of course, the already examined prices of the three major groups don't include all additional fees. Telus also offers minimal service with the "Talk 20" package at a rate of \$20 monthly, and the package presentation page²²⁶ makes no mention of additional fees.

At this stage, we've attained our objective if the reader feels a little confused. And this is only an overview of these markets: The consumer who isn't completely sure he understands his current and medium-term needs has to choose from literally hundreds of assumptions that aren't easily compared, since their terms and conditions differ and relevant information is sometimes imprecise, located elsewhere, or totally absent.

In the other Quebec cities where we tried to evaluate the presence and offers of competitors, we find everywhere (except in Rouyn-Noranda) at least two wired telephony providers, at least four mobile telephony providers and at least two high-speed Internet access providers. In short, a truly conscientious consumer has to devote himself to the arduous task of identifying all the providers present in his territory²²⁷ and to compare their offers.

To the number of providers and proposals is added the temporal dimension. For instance, with regard to residential wired service in Ontario, the Shaw Group advertises packages whose favorable prices apply only to the first six months of the contract; monthly rates then increase, for one service, from \$19.95 to \$29.95 subject to a bundle subscription, and for the other service, from \$29.95 to \$45 or \$55 monthly, depending on a bundle subscription. In other words, a consumer who subscribes to the simplest and least costly service, and who doesn't want to change the services he receives, will see his bill jump by 75.2% as of the seventh month; the difference is not small.

²²⁶ Telus offers 7 plans at www.telusmobility.com/qc/plans/pcs/talk_all.shtml, all of them with options, and seven other plans are listed at www.telusmobility.com/qc/plans/pcs/index.shtml.

²²⁷ That alone can pose a challenge. National companies advertise enormously, but regional or local providers don't have the same resources, which doesn't necessarily prevent them from offering terms that are least as advantageous.

The major groups' advertising certainly attracts the attention of potential customers. Here again, a closer look is necessary. In fall 2007, the Rogers Group distributed in some Montreal neighborhoods a flyer²²⁸ announcing, in a red sidebar in large print, residential telephone service for less than \$20 a month. On the back of the letter, it's mentioned five times that this offer saves consumers \$120 in the first year. Below, 11 narrow lines of small print add a number of factors to take into account to have an accurate idea of the offer: First, monthly system access fees of \$4.50 are added to the bill, as well as monthly service fees whose amount is not indicated. Second, the \$120 in savings applies only to customers subscribing to Rogers' home phone services and one of its long distance packages. One way or another, an "early termination fee of \$120" is charged to customers who would cancel their contract in the first year. A two-year subscription appears required, but nothing specifies whether that requirement applies to the main offer or to other terms referred to earlier in the text.

Smaller competitors are no less devious. Persona Communications Ltd., for instance, announces in large print residential telephony for \$24.99 a month, while adding in subtext that this rate is offered only upon subscription to a bundle including digital cable television and high-speed Internet access.

The Saskatchewan market differs a little from those of Ontario and Quebec: The main provider is owned by the provincial government, and the markets are more concentrated. Do those two factors have effects on research costs?

Sasktel's rate schedule is remarkably simple. Wired service is offered at a fixed rate. A subscriber who chooses a bundle benefits from a discount of \$5 per added service. The company offers five Internet access packages²²⁹ and seven mobile telephony packages. The consumer only has to combine everything... Sasktel's Web site, however, is not very user-friendly.

Moreover, the Saskatchewan market is characterized by a telecommunications service cooperative, *Access Communications Co-operative Limited*, which offers a vast range of services: The rate for wired telephony is clearly higher than that of Sasktel, but the bundles appear more favorable.

On the other hand, Shaw's offer is more complex. Prices vary over time. Wired telephone rates include long distance rates that competitors generally offer outside the local wired service rate.

On the whole, to the average consumer, the Saskatchewan market doesn't appear that different from those of Quebec and Ontario in terms of research costs – at least in the main urban centers. In rural areas, the consumer runs a greater risk of facing another barrier to migration – insufficient competition.

There are dozens of different offers in all the markets – offers difficult to compare, given their specific features. Complex offers that can be evaluated only by taking into account a host of oft-scattered details. Offers that could be more transparent. And none of the three large service markets seems more accessible than the others, especially given the

²²⁸ Rogers Communications Inc. Document MON/F/LH/0907, reproduced in Appendix 2.

²²⁹ Which, however, are not all accessible over the entire territory; far from it: three of them are accessible in only 10 localities.

importance of the role played by bundles in the consumer's search for the most appropriate offer. Information exists in abundance. But that doesn't make it easier for the consumer to process it; overabundance and complexity don't favor understanding and don't make it easier to choose.

The consumer feels that he will surely lose only a few dollars a month by not making the best choice, but in his research he faces a market that he can understand only by studying it – now, before entering into a contract – for several hours²³⁰. The cost in time is immediate and considerable, whereas the potential benefit is eventual and appears relatively low in terms of each monthly payment. There is reason to believe that market conditions impose research costs discouraging the consumer from making an exhaustive examination of the offers made to him, and therefore that he doesn't always make the best choice.

On the contrary, he risks being tempted not to change providers. He knows the terms of service and some of the frills offered by his provider; he's familiar with that, whereas he would have to learn a competitor's rules. Complexity can persuade him not to choose, and thus not to migrate.

B) OPACITY COSTS

By "opacity costs" we mean those resulting from the impossibility of distinguishing between the actual costs and prices of each component of a service offer. A typical example: a mobile telephony package that includes the provision of a telephone.

Examining opacity costs is all the more important because providers often make these confusing factors the main argument for entering into fixed-term contracts assorted with early cancellation penalties. In effect, the providers want the cost of their telephone "gift" or discount to be amortized over the entire term of the contract. For his part, the consumer sometimes measures poorly the true value of that "subsidy", particularly when there is a discount rather than a "gift". To the difficulty of comparing offers is added that of calculating the actual advantages of an additional product or service (whose value is not always easy to determine) and determining its actual cost (for example, related early termination fees).

The presence of opacity costs in Canadian telecommunications service markets is beyond doubt. Let's take as an example Bell Canada's Web site, which allows the consumer to choose his telephone in Quebec, and let's compare the prices demanded²³¹ according to the term of the agreement, with regard to four telephone models²³²:

²³⁰ The time required for performing our own analysis, which only covers part of the markets, is eloquent proof of that.

²³¹ In mid-March 2008, under the provisions stated there.

²³² Out of thirty models, which of course raises the issue of research costs again... To make this comparison, our choice of Bell and its 4 telephone models was essentially random.

Table 2
Comparison of the sale prices of certain telephones
from one provider (Bell),
by contract term

Telephone	3 years	2 years	1 year	no contract	prepaid
LG Chocolate	\$0,00	\$50,00	\$199,95	\$249,95	\$149,95
Samsung M300	\$24,95	\$74,95	\$99,95	\$149,95	\$69,95
Samsung M620	\$24,95	\$99,95	\$199,95	\$249,95	\$249,95
Samsung r610	\$74,95	\$149,95	\$249,95	\$299,95	\$299,95

First we note that the strategy of offering a considerably lower price only for certain telephones is difficult to grasp. As part of fixed-term contracts, the telephone's price manifestly varies a lot, but not uniformly. Between the telephone's price within a one-year and a three-year contract, the ratio jumps, depending on the telephone, from 3 1/3 to 1 (Samsung r610) to 10 to 1 (Samsung m610). In any case, the consumer still perceives an advantage in subscribing to a fixed-term contract.

Moreover, it's not always easy to compare the price with the actual value of the telephones offered to the consumer. For instance, the Samsung M620 doesn't appear to be offered in the retail market. An Internet search reveals that without a contract, Telus sets the price at \$349; but when the device was launched, the Wall Street Journal mentioned a retail price of \$149²³³.

An examination of the price schedule for the telephones of a reseller, Virgin Mobile, that uses the Bell network, provides another good example. Although Virgin also offers the Samsung m300 model, the two companies' price schedules differ significantly:

Table 3
Comparison of the sale prices of the same telephone
from two providers, by contract term

Provider	3 years	2 years	1 year	no contract	prepaid
Bell Canada	\$24.95	\$74.95	\$99.95	\$149.95	\$69.95
Virgin Mobile ²³⁴	0	\$49.00	\$49.00	\$79.00	\$79.00

Virgin Mobile demands a higher prepaid price than does Bell, whereas it seems to directly target this prepaid market. However, it offers the device at a price clearly more favorable than Bell's to customers that enter into fixed-term contracts, and at times even gives the device. Curiously, the price is the same in a one- or two-year contract. Of course, a detailed comparison of the two providers' various packages would be required to establish the extent to which this lower telephone price affects the packages' prices.

It may be objected that data accessibility contradicts the existence of any opacity. It should be noted that consumers won't generally make an exhaustive comparative study that alone

²³³ Mossberg, Walter S. *Latest Music Phone Is a Creative Gadget Marred by Big Flaws*. Wall Street Journal. Available at: <http://ptech.allthingsd.com/20070329/upstage-phone-flaws/>

²³⁴ On trouve la grille, consultée en mars 2008, au www.virginmobile.ca/site/fr/pricesAndFeatures/pdfs/Pick_a_phone_FR.pdf.

might shed light on the opacity. Moreover, the unavailability of a device's actual price makes any objective analysis impossible.

Another level of complexity is added: In its Family package, Bell offers the possibility of buying a telephone by subscribing to the package and obtaining as a bonus a free Samsung m300 telephone, subject of course to complying with a plethora of conditions²³⁵. However, the monthly payment doesn't vary: The total price of a second telephone is at least partly hidden – and incidentally, it will be defrayed uselessly by subscribers who, for whatever reason, decide not to avail themselves of the possibility of obtaining and using this second device offered “free of charge”. This type of offer is of course not peculiar to Bell.

That being said, the market of mobile telephones is not the only one to generate opacity costs. For example, Saskatchewan residents wanting to subscribe to high-speed Internet access can benefit from a Shaw offer that is formulated in a way that can hardly be qualified as transparent:

Customers who sign up for Shaw High-Speed Xtreme Internet service before March 31 2008, will receive a Shaw High-Speed modem and the first 30 days of service at no charge and then pay \$39,95 per month for months two to seven. Beginning in month eight, customers will pay as little as \$42 per month when bundled with any other Shaw service.

We note that the consumer is never informed of the value of the modem provided to him “at no charge”, and that the price is hidden in the monthly service payments.

The value of services obtained may be difficult to establish even when tangible goods are not involved. An example is the common practice of Internet access providers to offer their subscribers antivirus software “free of charge”²³⁶: The value of the service is most often indeterminate. The consumer already subscribing to the Internet service may have to pay an unknown price inseparable from that of the services he actually wants, while already having adequate security software. This last difficulty also falls into the category of superfluity costs.

We have reviewed the opacity costs related to various types of telecommunications services, considered separately. Other such costs are related to bundles. The Web page comparing Bell bundles makes it easy to determine the cost of each package component and to see that the cost of each service is constant. For example, the price for mobile telephone service is the same in a wired + mobile bundle as in a wired + mobile + Internet bundle. Sasktel's package policy is also relatively simple, with the cost of a service being reduced by \$5 when added to a bundle.

However, at times things are less clear. The Web page comparing Cogeco bundles²³⁷ imposes an algebra exercise on consumers wanting to know the individual price of the various services.

²³⁵ We consulted the bundle's description in mid-March at www.bell.ca/shopping/PrsShpWls_RtpFamilyShare.page?INT=MOB_SA_Q4_DatA_LM_whpbest.

²³⁶ Among others, Access Communications, Bell, Cogeco, Rogers (which, however, indicates “a value of \$104.98”) and Sasktel.

²³⁷ At www.cogeco.ca/en/bundle_calculator_q.html.

At Rogers, the combination of two, three or four services²³⁸ saves 5%, 10% or 15%, respectively. This means that the price of a particular service varies according to the size of the bundle. Moreover, beyond four services, there are no additional savings; we thus have a bundle whereby the price of each component depends on the choice of the four services taken into account in calculating the discount.

These examples indicate the spread of opacity in telecommunications markets. Greater transparency would enable consumers to compare the offers of competitors more easily and would help them better understand the nature of the contractual commitments.

Opacity costs likely constitute a loyalty-building tool. Once the equipment has come to term, consumers are bound by relatively long-term contracts and are therefore less inclined to change providers frequently. The abundance of such costs singularly complicates a comparison of offers presented to consumers, increases the inertia effect and inevitably lowers market efficiency.

C) TRAINING COSTS

“Training costs” are related to the configuration of new services and to learning their features and methods of use. Those costs may be considerable, even though they’re mainly non-monetary: the consumer simply has to spend time mastering the features of his services and devices.

Nowadays, the instruction manual of a simple mobile telephone contains at least 70 pages²³⁹. If a device is a little more versatile, things really get complicated: the user guide of the Nokia 5300 Music Xpress telephone contains a hundred pages; the option of “listening to your music” covers two pages and describes 17 different options or commands²⁴⁰. The terms of use specific to a mobile service easily require forty pages²⁴¹.

This is doubtless the main factor in training costs. But there are other factors. We have only to consult the rate schedules of mobile telephony providers to understand that the subscriber may have to memorize a lot of factors to determine if and when he can make calls at a good price.

For example, the subscriber to Fido’s Urban package has 1,000 minutes and unlimited in-calls within his urban area²⁴², but the air time “for calls made and received outside your Urban area” costs \$0.35 per minute. With the addition of long distance calls, special discounts, the cost of out-calls and who knows what else, we note that the strategy of controlling the costs of telephone communications is an art. Obviously, a subscriber who

²³⁸ The combination of 4 or more services is impossible in a market such as Montreal, since the Rogers group does not offer cable television there, but it is possible in many Ontario markets, where Rogers offers up to 6 services.

²³⁹ For example, the French section of the Nokia 6061 user guide is on pages 65 to 140.

²⁴⁰ Nokia. *Nokia 5300 Music Xpress User Guide*. Consulted at http://nds1.nokia.com/files/support/nam/phones/guides/5300_CA_en.pdf. The bilingual guide contains 193 pages.

²⁴¹ For example, *Get to know Fido*. Document carrying the mention 08-2006.

²⁴² Which has nothing to do with long distance zones: the Urban zone of Montreal extends roughly from Vaudreuil-Dorion to Repentigny (not including Mascouche) and from Blainville to Ste-Julie: http://www.fido.ca/portal/en/packages/urban_en.pdf.

changes packages – or worse, providers – must adapt to other rules, otherwise his next monthly payment will be an unpleasant surprise.

The terms and devices related to wired service and Internet access are likely to pose less difficulties, because they generally require less attention by subscribers – and because the interface of wired telephones has not changed much in the past few decades. However, VoIP protocol telephony may also require the consumer to make a few adaptations.

Like research costs, training costs are difficult to quantify. The latter may nevertheless constitute real factors of market inertia.

D) UNCERTAINTY COSTS

Uncertainty costs are related to the fact that changing providers poses the risk of absent or insufficient information about offers or providers, including total cost, service quality or provider reliability. The consumer may feel that he's drowning in information, but he still doesn't always find all the information he wants. For instance, in mobile telephony, he's presented with a device and a discount related to a fixed-term contract, along with related monthly payments, but rarely with the total of both amounts or the average monthly cost, for example, which would enable him truly to compare the various offers.

Moreover, there are few precise and credible indications of service quality. Consumers find that the service sold them is not provided reliably and adequately in the specific territory they reside in. Each provider claims to have the "best" network, without the consumer's knowledge of what is being compared, or his ability to have impartial sources validate such assertions.

Among consumers' other worries, justified or not: if I leave my provider, will my telephone number still be displayed in the phone book? Will I still have access to the directory assistance and emergency services? Can I keep my long distance service provider after changing local telephone service providers? All these worries favour the status quo. Moreover, the uncertainty costs will generally be higher regarding new types of services or new providers.

This is the case for VoIP (Voice over Internet Protocol), a new technology likely to raise a lot of questions, and even worries, among consumers. These worries were notably raised by the Public Interest Advocacy Centre (PIAC)²⁴³ before the CRTC at the Telecom 2004-2 public notice²⁴⁴, which aimed to define the regulatory framework for this service.

i) VoIP and 911

One of the concerns was about access to 911 service. Indeed, when VoIP technology was established, the CRTC demanded that the new VoIP actors notify their subscribers of the limitations or unavailability of 911 service. On that occasion, PIAC declared that public safety was non-negotiable, given that the safety of people was at stake. In addition, VoIP technology did not make it possible to use automatic location identification technology, thus rendering useless a call made by a person unable to mention his coordinates. In its Telecom

²⁴³ See the comments from PIAC on the CRTC site at: www.crtc.gc.ca/partviii/eng/2004/8663/c12_200402892.htm.

²⁴⁴ See the Public Notice on the CRTC site at: www.crtc.gc.ca/archive/eng/notices/2004/pt2004-2.htm.

CRTC 2005-21 decision²⁴⁵, the CRTC compelled Canadian companies offering local wired VoIP services to provide 911 service where provided by an incumbent local service company. Other local VoIP services, such as mobile services, or accessed from a telephone number not belonging to a district in the service area of the public safety call centre, were ordered to establish a temporary solution ensuring a level of service comparable to basic 911 emergency service. The companies still had to advise their customers of any 911 service limitation. Afterward, the CRTC rendered two decisions regarding the establishment of an advanced 911 service for subscribers to mobile and wired VoIP services that don't belong to such a district²⁴⁶.

The simple facts that the question of 911 service access is raised, and that the CRTC has decreed several types of measures enabling access to emergency services varying according to the type of VoIP service, don't eliminate consumers' uncertainties about this new technology.

ii) VoIP, privacy and confidentiality

This concern about access to emergency services is combined with concern about the privacy of VoIP users. Indeed, VoIP uses the Internet, whose security is often questioned. Accordingly, consumer associations have demanded that VoIP service providers be subject to the same privacy protection standards as are telecommunications service providers. In its Telecom 2005-28 decision, the CRTC concluded "that the existing regulatory requirements designed to protect customer privacy apply to all local VoIP service providers, to the extent technically feasible"²⁴⁷. This reservation regarding certain providers' technical limitations and exclusion of responsibility clauses, with respect to the security and confidentiality of communications²⁴⁸, is not reassuring either.

iii) VoIP and breakdowns (electricity and/or Internet service)

Consumers expect to have access to their residential telephone service at all times. VoIP service being dependent both on electrical power and Internet service, the risk of breakdown is naturally higher than for wired telephony. Indeed, in its own advertising, Bell has not refrained from emphasizing this risk of VoIP telephony. VoIP service providers also advise their customers of this risk, and that in the event of breakdown, 911 emergency service will be unavailable too²⁴⁹. This limitation to uninterrupted service is certainly capable of worrying consumers and making them hesitate before adopting this new technology.

²⁴⁵ See Telecom Decision CRTC 2005-21, available at: www.crtc.gc.ca/archive/eng/decisions/2005/dt2005-21.htm.

²⁴⁶ See Telecom decisions 2006-60 and 2007-125, available at: www.crtc.gc.ca/archive/eng/decisions/2006/dt2006-60.htm.
www.crtc.gc.ca/archive/eng/decisions/2007/dt2007-125.htm.

²⁴⁷ See Telecom Decision CRTC 2005-28, available on the CRTC site at: www.crtc.gc.ca/archive/eng/decisions/2005/dt2005-28.htm.

²⁴⁸ See for example Vonage's terms of service: "Network Security. Vonage Service utilizes, in whole or in part, the public Internet and third party networks to transmit voice and other communications. Vonage is not liable for any lack of privacy which may be experienced with regard to the Service." Available at: http://www.vonage.ca/features_terms_service.php

²⁴⁹ See for instance Vonage's terms of service: "911 Dialing service will not function in the event of a power or broadband outage or if your broadband, ISP or Vonage Canada service is suspended or disconnected. Following a power failure or disruption, you may need to reset or reconfigure your Device prior to utilizing the service, including 911 Dialing". Available at http://www.vonage.ca/features_terms_service.php; see also Primus' "talkbroadband" service: "Service outages. You acknowledge and understand that during service outages by your broadband

iv) VOIP and residential alarms

Certain VoIP providers advise their customers that their service may be incompatible with residential alarm systems, which could thus not communicate with the centre to signal an intrusion. This limit would impose the maintenance of a subscription to a traditional line to maintain the alarm²⁵⁰. A subscriber who wants to use VoIP service would thus have to pay for additional telephone service in order to maintain his residential alarm.

All these uncertainty costs are, here again, difficult to quantify: They're related to apprehension of an eventual risk. However, uncertainty rarely spurs immediate change; rather, it invites procrastination. It thus probably contributes more to customers' inertia than to their migration.

E) PSYCHOLOGICAL COSTS

By "psychological costs" we mean those associated with breaking a relationship with a provider whose customers may be relatively satisfied. Those costs are all the more important because the provider has given itself an image the customer identifies with. In fact, marketing strategies put the accent on aspects such as socialization or self-image much more than on the specific features of products or services (or prices).

Inversely, of course, a consumer can expect a psychological benefit from at last leaving a provider he's deeply dissatisfied with, and from promising never to return. Emotions can affect customer mobility. Companies know this well, and invest mind-boggling amounts on advertising; studies conducted for purposes other than marketing should also take emotional factors into account.

2 - TECHNOLOGICAL COSTS

A) EQUIPMENT COSTS

By "equipment costs" we mean those related to the necessity of acquiring equipment (including software) that is specific to a given provider and cannot be used for obtaining the services of a substitute provider. Those costs may be relatively significant quantitatively, but it is difficult to evaluate the extent to which they discourage customer mobility.

internet service provider or for any reason whatsoever, your talkbroadband service, **including 9-1-1 service**, will not work. In the event of a power failure, talkbroadband service, **including 9-1-1 service**, will not work. If there is an interruption in the power supply, the talkbroadband service, including 9-1-1 service, will not function until power is restored." Available at: <http://www.primustel.ca/en/residential/legal/termsofuse.html>.

²⁵⁰ See Zingotel's terms of service: "Home Security Systems. The Service may not be compatible with home security systems. You may be required to maintain a telephone connection through your local exchange carrier in order to use any alarm monitoring functions for any security system installed in your home or business. You are responsible for contacting the alarm monitoring company to test the compatibility of any alarm monitoring or security system with the Service." Available at: http://www.zingotel.com/online/en/user_agreement.php; see also Vonage's service contract: "Home Security Systems. The Service may not be compatible with home security systems. You may be required to maintain a telephone connection through your local exchange carrier in order to use any alarm monitoring functions for any security system installed in your home or business. You are responsible for contacting the alarm monitoring company to test the compatibility of any security system with the Service." Available at: http://www.vonage.ca/features_terms_service.php.

The most flagrant example of equipment costs in the Canadian telecommunications markets is obviously that of mobile telephones. Migration between Bell Mobility, Rogers and Fido is impossible without the acquisition of a new telephone, since their networks use different technologies. And we can't expect things to change in the short or medium term, particularly given the huge investments that would be necessary and the maintenance of protocols that are incompatible internationally. Unfortunately, the customer migration costs can prove quite substantial.

It should be recognized that, in a rapidly developing market, a lot of consumers are in any case prepared to regularly acquire a better telephone; they can thus invest in equipment even if they remain loyal to their provider. Still, there remains no doubt a vast pool of consumers who prefer to keep their "old" telephone, because of its cost as well as the training costs that would be entailed in replacing it – or because their environmental concerns induce them to limit the wastefulness of polluting devices, among other considerations.

A consumer who wants to migrate from the Internet access services of a provider using the telephone network to those offered by a cable operator (or vice-versa) will also have to acquire the required equipment. Here again, this barrier to migration involves real and substantial technological differences; it may be mitigated by discounts offered by providers regarding the equipment's value, but it still exists.

The wired telephony technologies of incumbent companies and cable operators are not identical. When a consumer wants to change providers, it is necessary to adapt the wiring in his home, and this is not always free of practical difficulties. At Bell's request, the CRTC addressed in 2006 the issue of certain installation practices, and concluded that it wasn't opportune to establish a national policy requiring providers to install in every home a network interconnection device that would make it technically easy to migrate from one type of provider to another²⁵¹. Although some stakeholders had emphasized that damage caused by a new installation of inside wires would pose major obstacles to customer migration²⁵², the Commission did not consider the issue of departure costs²⁵³.

Equipment costs take multiple forms and can block mobility in the three service markets under study here: wired telephony, mobile telephony and Internet access. Some of those costs can be minimized in the decision-making of consumers who are prepared to change equipment in any case, but they nevertheless constitute a variable whose value is often a crucial easily quantifiable barrier to the decision to change providers.

B) COSTS OF FEATURES AND EXCLUSIVITY

Because of their interrelationship, we will discuss the costs of features and exclusivity together, which are related to the loss of enjoyment of a device's physical features, or to the loss of access to content following a change in telecommunications service providers.

²⁵¹ CRTC. *Telecom Decision CRTC 2007-105 – Network interconnection device at residential customer premises*. Ottawa, 9 November 2007. Interconnection devices would in fact be installed on 45% of Bell Canada's lines, 30% of Bell Aliant's lines and 26% of Sasktel's lines: §§ 12, 23, 26.

²⁵² *Ibid.*, §§ 8-9.

²⁵³ The CRTC confirmed in 2008 its refusal to intervene in this matter. CRTC. *Telecom Decision CRTC 2008-7 –Part VII application regarding Vidéotron Itée's practices when disconnecting Bell Canada's network from a residential customer's inside wire*. Ottawa, 29 January 2008.

Those costs take numerous forms. We mentioned above that in migrating to telephone services offered by cable operators, the consumer inevitably renounces a certain level of security as to service availability, and that access to 911 services through software telephony would be less reliable.

To take another example, no telephone device offered by the Fido network is a Blackberry or offers any connection of that type. A detailed comparison of devices used on the various networks would no doubt take into account technical features offered by one group of providers but not another.

Exclusivity costs are, particularly regarding mobile telephony, advertised by the various competitors. Music download services often constitute sales arguments about quantity, exclusivity, etc.²⁵⁴

We recall the offers of Bell Mobility, which in 2007 promised exclusive and first-run access to the most recent episodes of *Têtes à claques* or to excerpts of well-known television programs. Although Bell's exclusivity to *Têtes à claques* is a thing of the past, Vidéotron's subscribers, for example, don't always appear to have access to the entire collection of gags²⁵⁵. Among the exclusive offers of providers: exclusive ringers, draws for show tickets, chat or dating networks, screen backgrounds, etc.

The costs of features and exclusivity, which appear most prevalent in the mobile telephony market, constitute obstacles to migration that can clearly be monetary, such as the need to acquire a new device, or that can entail loss of access to communities or services. In any case, these are factors that the consumer weighs in choosing or not to change providers.

C) PORTABILITY COSTS

By "portability costs" we mean those associated with the impossibility of continuing to use an e-mail address or a personal Web site address after a change of providers, or with the red tape required for obtaining address or other portability²⁵⁶.

Under the heading "Local number portability", Fido indicates that a wireless-to-wireless transfer should take about 2.5 hours, and wired-to-wireless transfer about 2 days, but that "either of these types of transfers could take up to one week depending on the complexity of the number transfer and your old service provider"²⁵⁷.

Rogers, though, doesn't display the same optimism. Its Web site mentions that the transfer takes three to five days²⁵⁸.

²⁵⁴ See for example: Bell: Unlimited Full Track Music, at www.bell.ca/shopping/PrsShpWls_Full_Track_Music.page.

²⁵⁵ The various providers' offers are compared at www.tetesaclaques.tv/mobile.php.

²⁵⁶ The rules in effect in Canada now oblige providers to offer telephone number portability. The CRTC recently confirmed VoIP telephone number portability. CRTC. *Telecom Decision CRTC 2008-11 – Review of local number portability for voice over Internet Protocol services*. 1 February 2008.

²⁵⁷ Fido. *Local number portability*, consulted in March 2008 at www.fido.ca/portal/en/lnp/how_bring_number.shtml.

²⁵⁸ At www.rogers.com/web/link/hpBrowserFlow?forwardTo=Plans.

Nothing requires or allows the transfer of e-mail addresses or the hosting of Web site addresses²⁵⁹. We haven't found in the United States, or the United Kingdom, or France, any indication that such transfers are permitted or contemplated. The prospect of informing family, friends and contracting parties of a difficult e-mail address change is no happier than that of informing them of a telephone number change. Whereas the latter has rightly been identified as a departure cost, the former also is and to the same extent, or will be eventually.

Nothing suggests that this barrier to migration, whose importance is felt by a number of consumers, is likely to be abolished in the foreseeable future.

3 - CONTRACTUAL COSTS

A) THE OVERALL FRAMEWORK

The telecommunications service contract can be found in one or several documents. Its terms and conditions may be general or very specific. But there is a contract, which may in various ways raise obstacles to customer migration, often because the terms and conditions directly aim to retain the subscriber.

Several providers have acquired model terms or framework agreements, which apply to all the services provided to consumers. The specific contract between a provider and a consumer is thus constituted in good part by the content of that document, to which must often be added other content, such as the agreement's term or the precise nature of equipment provided. Other documents, or a purely verbal or tacit agreement, will thus complete that particular contract.

The comments below cannot claim to exhaust the content of contractual relations between the parties. The existence of complementary documents indeed significantly mitigates the content of the framework agreements.

Upon examination of the framework agreements, we observe an impressive quantity of provisions whose observance of consumer protection laws in the various jurisdictions of interest to us is not manifest. We have not attempted here an exhaustive inventory, both because that exercise would have greatly exceeded the scope of the present study and because it has already been done a few times²⁶⁰; the situation does not appear to have significantly improved since. However, we will note certain specific aspects that might be evoked by consumers wanting to claim that unfavorable contractual clauses don't apply to them.

We haven't examined the terms of "regulated contracts", i.e., those of wired service providers that still have the rates adopted by the CRTC; that task would have been

²⁵⁹ We of course omit here situations where a person has his own Web site address, hosted by a provider, such as www.consommateur.qc.ca; the difficulty arises when the site's address is linked to the access provider's.

²⁶⁰ See for example McDonald, James; St-Pierre, Nathalie. *La téléphonie cellulaire: les pièges de la transaction*. Shawinigan, Service d'aide au consommateur, 2004. 135 p.; St Amant, Jacques. *Pris dans la toile: les consommateurs canadiens and les contrats proposés par les fournisseurs de services Internet*. Montreal, Option consommateurs, 2004. 63 p.

enormous, and those terms appear to contain few aspects that constitute truly significant barriers to migration²⁶¹.

We have focused on contracts offered by the main providers, while occasionally considering the terms offered by smaller competitors. More specifically, we have examined the following documents:

- *Access Communications: General Terms of Service, including Access Digital Phone – Additional Terms of Service*²⁶²;
- *Bell Canada: Unregulated Terms of Service (Consumer)*²⁶³, *Wireless Terms of Service*²⁶⁴, *the service agreement Total Internet and Sympatico internet services*²⁶⁵, and *Bell Bundle Conditions*²⁶⁶;
- *Cogeco: Cogeco Cable Québec Inc. General Terms and Conditions and Cogeco Cable Canada Inc. General Terms and Conditions – Residential Services*²⁶⁷;
- *Fido: Acceptable Use, Privacy & Fido Terms and Conditions*²⁶⁸;
- *Persona: Terms and Conditions*²⁶⁹;
- *Rogers: Modalités de service de Rogers*²⁷⁰, *Rogers Terms of Service*²⁷¹ and *Rogers Terms for the Better Choice Bundles Discount*²⁷²;
- *Sasktel: Sasktel Non-Tariffed Terms of Service*²⁷³, *Sasktel Internet Services Terms of Service*²⁷⁴, *Sasktel High Speed Internet Customer Loyalty Discount*

²⁶¹ For an overview, see for example the table of contents of Sasktel's *General Tariff - Basic Services*, at www.sasktel.com/about-us/company-information/legal-and-regulatory/tariff-indices/sasktel-general-tariff-basic-services-21411-alphabetical.html.

²⁶² (16 p.) Consulted at www.accesscomm.ca/access?PAGEID=208. Again, Access is a cooperative providing telecommunications services in Saskatchewan. Hereinafter "Access Terms".

²⁶³ (3 p.) Consulted at www.bell.ca/web/common/all_languages/all_regions/pdfs/FINAL%20Consumer%20UTOS.pdf.

Hereinafter "Bell Terms".

²⁶⁴ (11 p.) Consulted at www.bell.ca/support/PrsCSrvWIs_Bill_ServiceAgreement.page. Hereinafter "Bell Mobility".

²⁶⁵ (20 p.) Hereinafter "Sympatico Terms". Available at http://assistance.sympatico.ca/index.cfm?method=content.view&category_id=550&content_id=11013.

²⁶⁶ At www.bell.ca/support/PrsCsrVgnl_BellBundleTerms.page. (1 p.) Hereinafter "Bell Bundle".

²⁶⁷ At www.cogeco.ca/files/pdf/legal/Terms_and_Conditions_en_051007.pdf (5 p.) and at www.cogeco.com/files/pdf/legal/Terms_and_Conditions_on_en_050520.pdf (5 p.). The documents concern Quebec and Ontario, respectively. Hereinafter "Cogeco Qc" and "Cogeco On", respectively.

²⁶⁸ (20 p.) Available at www.fido.ca/portal/fr/home/legal.shtml. Hereinafter "Fido Terms".

²⁶⁹ (8 p.) Available at www.persona.ca/index.php?id=181,600,0,0,1,0. Persona offers, among other things, telecommunications services in Northern Ontario. Hereinafter "Persona Terms".

²⁷⁰ (11 p.) Available at https://votre.rogers.com/about/legaldisclaimer/TOS_fr.pdf Hereinafter "Rogers Terms".

²⁷¹ (9 p.) Available at https://your.rogers.com/about/legaldisclaimer/TOS_Eng.pdf. Hereinafter "Rogers Terms".

²⁷² (2 p.) "Available at <http://your.rogers.com/store/bundle/main.asp> by clicking the hyperlink following the words *For complete eligibility rules, exclusions, and service terms*. This pop-up doesn't have its own address. Hereinafter "Rogers Bundles". We also examined the French and English versions of Rogers' *Internet Phone Service Terms & Conditions*, which were essentially identical to the general terms of service; therefore we have not examined them specifically here.

²⁷³ (22 p.) Document Available at www.sasktel.com/about-us/company-information/legal-and-regulatory/non-tariff-indices/attachments. Hereinafter "Sasktel Terms".

*Program Terms of Service*²⁷⁵ and *Sasktel Prepaid Cellular Calling Cards (“Prepaid Cards”) - Terms and Conditions*²⁷⁶ ;

- *Shaw: Joint Terms of Service*²⁷⁷ ;
- *Telus: General terms and conditions for TELUS products and services, including the Specific terms and conditions applicable to TELUS services and the Contractual term obligations of TELUS*²⁷⁸ ; *Modalités de service standard de la division Mobilité de TELUS*²⁷⁹ and *Telus standard mobility Service Terms & Conditions*²⁸⁰ ;
- *Vidéotron: Residential Telecommunications Services Agreement*²⁸¹ .

We will now examine, by theme and in alphabetic order of provider names, those documents’ aspects that are most relevant to this study.

B) CAPTIVITY COSTS

By “captive costs” we mean those related to the term of supply agreements and to penalty clauses for early cancellation. In examining agreement contents, we will focus on provisions setting the term of contracts, their renewal (including prior notices) and the penalties for unilateral cancellation. We will also take a look at rules allowing providers to unilaterally amend the content of contracts being executed, while that ability is never granted to consumers. We will also occasionally mention certain contracts’ aspects that could induce the courts to declare provisions null with regard to consumers.

i) Contract term

The contract term is one of the aspects most often mentioned in documents annexed to the framework agreement. Given the enormous range of offers in the market, and the fact that those annexed documents are made available only when a contract expires, it was obviously impossible to draw an exhaustive inventory of market practices. We can still note a number of points.

All the companies stipulate that the consumer can terminate an open-ended contract (monthly with automatic renewal) following 30 days’ prior notice. Fido²⁸² and Vidéotron, with

²⁷⁴ (17 p.) Document Available at www.sasktel.com/about-us/company-information/legal-and-regulatory/non-tariff-indices/attachments/s8-internet-services-terms-of-service.pdf. Hereinafter “Sasktel Internet”.

²⁷⁵ (2 p.) Available at www.sasktel.com/about-us-company-information/policies/public-policy/non-tariff-indices/attachments/s27-high-speed-loyalty-program-terms-of-service.pdf. Hereinafter “Sasktel Loyalty”.

²⁷⁶ (1 p.) Available at www.sasktel.com/about-us-company-information/policies/public-policy/non-tariff-indices/attachments/s28-prepaid-cellular-calling-cards-tos.pdf. Hereinafter “Sasktel Prepaid”.

²⁷⁷ (11 p.) Available at www.shaw.ca/en-ca/AboutShaw/TermsOfUse/JointTermsOfService.htm. Hereinafter “Shaw Terms”.

²⁷⁸ (7 p.) Available at www.telusquebec.com/telus_en/terms_and_conditions.pdf. Hereinafter “Telus Terms”.

²⁷⁹ (7 p.) Available at www.telusmobillite.com/about/mike_pcs_pt_policy.shtml. Hereinafter “Telus Mobility”.

²⁸⁰ (6 p.) Available at www.telusmobility.ca/about/mike_pcs_pt_policy.shtml. Hereinafter “Telus Mobility”.

²⁸¹ (11 p.) Available at http://www.videotron.com/services/static/contrats/contract-res_en.pdf. Hereinafter “Vidéotron Terms”.

²⁸² Fido Terms, section 5, section “Satisfaction Guarantee”.

regard to mobile telephony²⁸³, allow a dissatisfied subscriber to terminate his contract within 15 days, as long as he can, notably, return the equipment in its original packaging.

In Saskatchewan, Access seems to offer mainly short-term bundles initially, and then the agreement likely changes into an open-ended contract²⁸⁴.

The Bell Group offers a vast range of services, products, packages and bundles, in prepaid mode, with open-ended or fixed-term contracts of one, two or three years. General terms and conditions for wired service don't specifically contain contract term provisions²⁸⁵. Terms and conditions of wireless service call for commitment periods of 30 days to 36 months²⁸⁶. The Internet service contract we have examined states that it applies during the "initial period", and then continues²⁸⁷.

When a Cogeco customer subscribes to an offer granting him discount rates, the agreement "shall be for a term of at least the minimum contract period required by the Promotion"²⁸⁸. Cogeco's offers generally appear to last 12 months.

The term of Fido's packages varies considerably: some are offered "without agreement" while others last for periods of up to three years²⁸⁹. Fido's terms and conditions expressly stipulate that at maturity, the fixed-term contract becomes an open-ended one but the provider may propose that the customer renew the agreement for a fixed term²⁹⁰.

Persona provides telephone service with a variety of terms and conditions, including an indefinite term; we found it impossible to tell with regard to Internet access services. However, when the consumer subscribes to a bundle, the company's Web site indicates that the contract's term is 12 months²⁹¹, whereas certain promotional offers regarding cable television impose a minimum term of two years²⁹².

Rogers offers its services in prepaid mode (mobile telephony) or in contracts of 12, 24 or 36 months. The generic terms and conditions specify that the agreements "shall continue indefinitely until terminated"²⁹³.

The contract generally governing Sasktel's non-regulated services normally lasts at least one month, unless a longer period has been stipulated²⁹⁴. The Internet service contract

²⁸³ *Ibid.*, sec. 43.

²⁸⁴ Access Terms, section *Customer initiated termination or change of services*.

²⁸⁵ Bell Terms, sec. 4.

²⁸⁶ Bell Mobility, sec. 1, "Committed Service Period".

²⁸⁷ Sympatico Terms, sec. 1, 4.

²⁸⁸ Cogeco-Qc, sec. 20; Cogeco-On, sec. 18.

²⁸⁹ *Monthly packages*, au www.fido.ca/portal/packages/monthlypackages.jsp.

²⁹⁰ Fido Terms, section 5, sec. 30.

²⁹¹ Persona. *Frequently Asked Questions - Home Phone*, section "Billing". Available at www.persona.ca/index.php?res_telephone_faq.

²⁹² *Promotions* page, which can have an effect on bundle terms, as rechecked on March 24, 2008, at www.persona.ca/index.php?id+150,539,0,0,1,0.

²⁹³ Modalités Rogers and Rogers Terms, sec. 30 and 31

²⁹⁴ Sasktel Terms, sec. 9.1.

contains no term provision, but on the contrary mentions that the subscriber can terminate it at any time²⁹⁵.

Neither Shaw's service terms nor its Web information have enabled us to determine the term of contracts. Some offers include discount rates for a given period (usually six months), but afterward the price returns to normal with no indication of term²⁹⁶.

Telus' general terms prescribe the minimum term of contracts, which is one month²⁹⁷. The various packages and bundles generally last two or three years. Telus Mobility also offers the possibility of buying telephone devices "with no contract" or in the context of agreements of one to three years. The document *TELUS Contractual term obligations*, found at the end of the terms and conditions, contains more details about contract term provisions (automatic renewal of 6- and 12-month contracts, barring prior notice to the contrary, for as long as the initial term and under the same conditions, except the price). We note first that no rule applies to contracts of between 13 and 35 months, notably two-year contracts, which we know to exist. Afterward, the contract is renewed at a price unilaterally set by the provider.

Vidéotron's service contract establishes that when the consumer has opted for an "extended subscription period" for a package or bundle, the contract lasts 30 days for Internet access, wireless telephony and cable broadcasting, and 12 months for digital telephony by cable²⁹⁸. At maturity, the contract is renewed for an identical period and at the price in effect at the time, barring prior notice to the contrary²⁹⁹. We know that the bundles offered by Vidéotron on its Web site in March 2008 are generally conditional on subscription to a 12-month contract for at least some of the services provided; the company's generic contract, however, provides for periods of 12, 24 or 36 months³⁰⁰.

We observe that monthly contracts that renew automatically barring notice to the contrary could actually renew perpetually. Perpetual contracts are admitted by Quebec's Civil Code³⁰¹, but common law is more reticent toward them³⁰².

ii) Penalties

With the exception of Shaw, which has no provisions for the term of its contracts, all the companies prescribe penalties if the consumer cancels his contract.

Access indicates, without specifying the amount, that if a contract is cancelled, the customer "may be obligated to reimburse us for costs in lieu of honouring a minimum contract term. In no case will reimbursement exceed the normally-priced value of the product consumed"³⁰³.

²⁹⁵ Sasktel Internet, section *General*, sec. 3.

²⁹⁶ Shaw Terms, section *Customer-Initiated Termination*.

²⁹⁷ Telus Terms, sec. 3.2.

²⁹⁸ Vidéotron Terms, sec. 8.1.

²⁹⁹ *Ibid.*, sec. 8.2.

³⁰⁰ *Ibid.*

³⁰¹ *Consumers Cordage Co. Ltd. v. St-Gabriel Land & Hydraulic Co. Ltd.*, [1945] S.C.R. 158; *Cyclorama de Jérusalem Inc. v. Congrégation du Très Saint Rédempteur*, [1964] S.C.R. 595.

³⁰² Fridman, *op. cit.*, pp. 552, 556.

³⁰³ Access Terms, *ibid.*

Bell Mobility announces early termination fees set at whichever is the higher of \$100 or \$20 per month remaining in the agreement, up to \$400³⁰⁴. If the subscriber also has a data transfer contract, an additional fee of \$99 applies. Fees for changes to packages or to certain services may be required, as displayed on the company's Web site³⁰⁵. Cancellation of a package feature or option may also involve fees³⁰⁶.

Anyone who subscribes to Bell's Internet services had better be sure of his decision: if he wants to terminate his commitment between the moment his order is confirmed and the moment the service is activated, he incurs a penalty of \$150 "to the extent permitted by applicable law"³⁰⁷. If he's been a subscriber for an initial period of 12 months, early termination earns him a penalty in the same amount, whereas longer contracts entail a higher penalty. The amount of these penalties doesn't vary according to the time remaining in the contract.

Bell can be magnanimous, though: when a customer cancels the contract "as a result of a material change in the Service", Bell waives the penalty – with the understanding that "changes to Service Fees are not a material change to the Service"³⁰⁸.

A Cogeco customer subscribing to an offer granting him discount rates must pay, in the event of cancellation, "the penalties indicated in the Promotion and in the Agreement"³⁰⁹. But we haven't found, either on Cogeco's Web site or in the agreements, any specific indication of the penalty amounts related to the offers announced. The company states that the customer is responsible for taking necessary measures to return rented equipment to the provider³¹⁰.

For open-ended contracts, Fido reserves the right to require early termination fees³¹¹. With regard to telephone services, "An Early Cancellation Fee (ECF) applies to all subscribers with a Fido Agreement, if, for any reason, their service is terminated prior to the end of the Fido Agreement. The ECF is the greater of the (i) \$100 or (ii) \$20 per month remaining in the Fido Agreement, to a maximum of \$400 (plus applicable taxes), and applies for each deactivated phone number."³¹² A subscriber who cancels the wireless Internet option has to pay a penalty that seems capped at \$25³¹³. If a subscriber migrates from a monthly package to prepaid service, he has to pay "a migration fee" of \$25.

³⁰⁴ Bell Mobility, sec. 1, "Early Termination Fee (or ETF)", sec. 9.

³⁰⁵ Bell Mobility, sec. 1, "Change Fee" and sec. 23. The reference to the rate schedule only takes us to the home page of www.bell.ca, and not to a specific page of that enormous site.

³⁰⁶ *Ibid.*, sec. 24.

³⁰⁷ Sympatico Terms, sec. 4.

³⁰⁸ *Ibid.* As opposed to the Bell Mobility contract, that of Sympatico contains no clause guaranteeing the stability of certain fees for the entire period of initial commitment.

³⁰⁹ Cogeco-Qc, sec. 21 and Cogeco-On, sec. 18.

³¹⁰ Cogeco-Qc, sec. 14 and Cogeco-On, sec. 12. The customer has to return the equipment to the provider's place of business.

³¹¹ Fido Terms, section 5, section "Charges; Account and Payment Information", subsec. 8.

³¹² Page "Monthly packages", at www.fido.ca/portal/packages/monthlypackages.jsp, fifth footnote.

³¹³ *Ibid.*, 6th note. The amount of the penalty is set at whichever is the higher of (i) \$25 or (ii) \$5 per remaining month up to \$100.

Persona's general terms are limited to establishing that the penalty for premature termination may never exceed the balance payable under the contract³¹⁴. The "Frequently Asked Questions" section of the company's Web site reveals that, more specifically, it plans to set the penalty for premature termination of the telephone service by multiplying the number of monthly payments by the monthly rate³¹⁵, i.e., exactly the balance payable under the contract.

Rogers' generic terms evoke the possibility that early termination fees will apply, without specifying the amount or calculation method³¹⁶. Navigating the provider's Web site also doesn't easily reveal that amount. However, the specific bundle terms state that fees apply if the consumer cancels his subscription to one of the bundle's services. The penalty is equivalent to the bundle's monthly discount multiplied by the number of remaining monthly payments, up to \$100 if the cancellation occurs within 12 months of the agreement, or up to \$50 within the next 12 months³¹⁷. A consumer who has subscribed to a Rogers residential telephony package that gives him a free telephone, and who cancels in the year following the conclusion of the agreement, must additionally pay a flat penalty fee of \$30³¹⁸.

Many of the agreements proposed by Sasktel don't appear to carry any cancellation penalty. Exception: a 24-month Internet access package offers consumers a discount of \$5 per month; the cancellation penalty is \$99³¹⁹, i.e., from two and a half to five monthly payments – and practically 20 months of discounts whenever the cancellation occurs.

The *TELUS Contractual term obligations* stipulate that, for contracts of 12 months or less, the total balance of the contract falls due at the moment of cancellation. The penalty is reduced to 50% of remaining payments in the case of 36-month contracts, and to 30% in the case of 60-month contracts. If the "outstanding balance" is less than \$10 per month, that amount is used as a "floor"³²⁰. It should be noted that nothing is mentioned in the case of 24-month contracts³²¹. Moreover, the same Telus document prescribes that a consumer who subscribes to a bundle may cancel any of the services on condition that he subscribes to a new contract, of the same length of the initial one, with regard to the services he wants to keep, and that he pays a penalty equivalent to 100%, 50% or 30% of the value of remaining monthly payments, depending on whether the initial contract had been concluded for 12 months or less, 36 months or 60 months³²². If the subscriber moves to an area not serviced by Telus, he may cancel his contract without penalty³²³.

³¹⁴ Persona Terms, section *Customer Initiated Termination or Change of Services*.

³¹⁵ Persona. *Frequently Asked Questions - Home Phone*, section "Billing", *ibid*.

³¹⁶ Modalités Rogers and Rogers Terms, sec. 8.

³¹⁷ Rogers Bundles. The value of the discount varies according to the services bundled. The discount is equivalent to 5, 10 or 15% of the price of services, depending on whether the bundle includes 2, 3 or more services.

³¹⁸ Whereas Rogers claims that the device's value is \$70: *Promotions* page in the "residential telephone" section. Other bundles, associated with other penalties, are also described on that page.

³¹⁹ Sasktel Loyalty, subsec. 4.

³²⁰ Contractual term obligations..., in Telus Terms, sec. 3.1 and 3.2.

³²¹ An untitled document handed to Telus customers states that in the event of early termination of the 24-month contract, the penalty is equivalent to \$20 per remaining month, up to \$100 in total.

³²² Obligations relatives..., in Telus Terms, sec. 3.4.

³²³ *Ibid.*, sec. 5.2.

Vidéotron includes in the contract a schedule indicating the penalties to be levied in the event of cancellation. The amount will vary depending the contract term and the moment (in blocks of 12 months) of cancellation³²⁴ :

Table 4

Penalties payable (\$) by a Vidéotron customer
in the event of early termination,
depending on contract term
and the moment of termination

Moment of termination	36 month	24 month	12 month
1st au 12th month	\$300	\$200	\$120
13th au 24th month	\$200	\$120	–
25th au 36th month	\$120	–	–

Surprisingly, the penalty amount doesn't vary according to the number of services the subscriber has bought into. The correlation between amount and term is quite weak. This table, however, doesn't exhaust the catalogue of penalties that may apply. If, in addition to obtaining a service, the customer rents equipment or has bought it with a term contract, his penalty is 50% of the rent for the remaining period or the total amount of the discount obtained, respectively³²⁵. Moreover, a Bell Sympatico subscriber is responsible for taking necessary measures to return rental equipment to the owner³²⁶.

iii) Unilateral amendments

Most service providers include a clause allowing them to unilaterally amend ongoing contracts. Barring mention to the contrary, a consumer dissatisfied with the contract as amended would have as sole remedy the contract's cancellation... with payment of early termination penalties.

Access reserves the right to change at any time the service terms and conditions or any aspect of the services provided. Notice of this may be given either by direct communication to the subscriber or on the company's Web site³²⁷.

With regard to wired telephony, Bell reserves the prerogative to:

*change the Services and/or this Agreement, including changing applicable charges, fees or other obligations; or any feature, content, structure or other aspect of any of the Services.*³²⁸

The text specifies that Bell must advise its subscriber in some way.

However, with regard to wireless telephony, the group pledges not to increase the "basic monthly voice plan charge" or the "out-of-bundle airtime charge" for the duration of a fixed-term contract, under certain conditions. But we shouldn't entertain illusions: the provider

³²⁴ Which repeats what is found in section 8.3 of Vidéotron Terms.

³²⁵ Vidéotron Terms, sec. 8.4.

³²⁶ Sympatico Terms, sec. 20.

³²⁷ Access Terms, section *General – Service Modifications*.

³²⁸ Bell Terms, sec. 3.

reserves the right, on prior notice of 30 days, to increase other fees or impose additional fees³²⁹ as well as amend the agreement otherwise, at its discretion³³⁰.

Fido shows a little more flexibility and allows its customers to require, as long as they do so quickly, the maintenance of contractual provisions to which the parties have agreed:

*If you do not accept a change to the Services, your sole remedy is to terminate the Agreement and the Services provided under the Agreement, within 30 days of your receipt of our notice of change to the Services [...].*³³¹

Rogers offers the subscriber this same ability regarding terms and conditions, but not regarding the contract as a whole³³².

The provider's ability to amend the agreement at its discretion is also found in the Internet access contracts of Bell³³³, Cogeco³³⁴, Fido³³⁵, Persona³³⁶, Rogers³³⁷, Sasktel³³⁸, Shaw³³⁹ and Telus³⁴⁰. In most cases, the customer is "reputed" to have accepted the amendments if he continues using the service, even if the amendments' only notice was a posting on the provider's Web site, which the subscriber is in fact often invited to consult regularly³⁴¹.

C) NETWORKING COSTS

By "networking costs" we mean the loss of the advantages of communications with subscribers of the same provider.

For instance, Rogers requires no long distance fees when its residential telephony subscriber calls other subscribers to Rogers or Fido wired or mobile service³⁴². A subscriber who often communicates by long distance with other Rogers or Fido customers will be reticent to leave, since that would lose him significant savings. In fact, a subscriber will probably not leave, but rather promote his provider to those in his circle.

Shaw pushes this logic a little further with its *Refer your friends and save* program³⁴³. An Internet service subscriber who convinces a friend to sign on receives a discount equivalent to a monthly payment.

³²⁹ Bell Mobility, sec. 3.

³³⁰ *Ibid.*, sec. 23.

³³¹ Fido Terms, section 5, introductory provisions

³³² Modalités Rogers and Rogers Terms, 4th paragraph.

³³³ Sympatico Terms, sec. 5, 10.

³³⁴ Cogeco-Qc, sec. 18 and 21; Cogeco-On, sec. 16, 19.

³³⁵ Fido Terms, section 2 – Acceptable Use Policy for the Fido Web site, sec. 6 and 7.

³³⁶ Persona Terms, sections *Revisions of this Policy*.

³³⁷ Modalités Rogers and Rogers Terms, fourth paragraph.

³³⁸ Sasktel Terms, subsec. 2.1; Sasktel Internet, section *Amendments to this Agreement* and section *Service Limitations, Performance and Availability*, subsec. 21.

³³⁹ Shaw Terms, introductory subsections.

³⁴⁰ Telus terms, subsec. 6.1; Telus Mobilité and Telus Mobility, sec. 18.

³⁴¹ For example, Cogeco-Qc, sec. 18.

³⁴² Rogers Communications Inc. Page consulted for the last time on March 24, 2008 at *Packages & Pricing*, at www.rogers.com/web/link/hpBrowseFlow?forwardTo=Plans.

³⁴³ At www.shaw.ca/en-ca/ProductsServices/Internet/Friend+Get+A+Friend.

Virgin Mobile offers \$10 to a subscriber who induces someone to join (maximum of 12 annually).

In another vein, Telus offers its Share wireless telephony plans, whereby up to five users residing in the same province can register on the same account, thus being allowed “unlimited nationwide calling”, notably³⁴⁴. Here again none of the participants will be interested in abandoning this community, which enables him to save, but which also benefits his loved ones.

Other providers also offer programs for creating preferred networks. But they don't all require all participants to be customers of the same provider.

D) DISLOYALTY COSTS

By “disloyalty costs” we mean the loss of the advantages of a loyalty program or of non-transferable services. We will only give a few examples here.

The *Fido Rewards* loyalty program “allows participants to accumulate FidoDollars^{MC}” and exchange them for devices or services³⁴⁵. The provider may change the program's terms at its discretion. The subscriber's participation ends with his contract, and then he loses the amounts accumulated and still unused³⁴⁶.

In its service terms regarding the cards acknowledging the purchase of mobile telephone air time, Sasktel specifies that unused amounts cannot be redeemed or credited in any way³⁴⁷. We generally find in this type of agreement the simple mention “not redeemable” on air time purchase receipts, for instance³⁴⁸.

E) BUNDLE AND MANAGEMENT COSTS

By “bundle costs” we mean the loss of the advantages of other services with the same provider. As for management costs, they involve the loss of the advantages of simplifying the management of several services through a bundle with the same provider.

Several providers whose offers we have examined propose more than one type of service. All providers offering at least two types of services offer bundles. These sometimes take the form of a \$5 savings monthly per service added, as with Sasktel and Bell³⁴⁹. At times they're clever combinations whereby the size of the discount depends on the number of services grouped and their particular nature, as with Rogers.

This type of offer is extremely popular³⁵⁰: A consumer wanting two or three services significantly reduces his research costs by comparing only the bundles containing those services, rather than the individual prices of each provider; since the bundles offer discounts, the consumer can believe that it must be a good deal.

³⁴⁴ At www.telusmobilité.com/qc/plans/pcs/share_plans_home.shtml.

³⁴⁵ Fido Terms, section 4.

³⁴⁶ *Ibid.*, sec. 4 and 9.

³⁴⁷ Sasktel Prepaid, subsec. 3.

³⁴⁸ See also: Telus Mobilité and Telus Mobility, sec. 3.

³⁴⁹ Bell bundle.

³⁵⁰ See the survey results below.

As a rule, the consumer is counting on economies of scale and management simplification: a single account and a single monthly payment, better control over cash, and a lower risk of bank overdraft and related costs.

On the other hand, a consumer who has subscribed to a bundle foregoes part of his mobility. If he unbundled his services, he would lose discounts. He would forego at least some of the economies of scale that bundling makes possible. He might lose certain services or options he likes. In short, most of the costs that we referred to above and that can impair migration are multiplied. Replacing one bundle with another, even if that maintains the economies of scale, generates most of the other costs to an extent.

Bundles can more subtly hinder mobility: the more popular they are, the more the small providers, not able to offer such a vast range of services, risk being marginalized. Bundles can favor market concentration and thus reduce competition and limit consumers' migrating options.

4 - SUMMARY

We detect traces – and at times much more – of some fifteen types of departure costs in Canadian telecommunications service markets. What to make of it?

Some of those departure costs are inevitable. At the moment of migration, there will always be psychological costs, however minimal. Some of the costs are almost inevitable: if all mobile telephony providers had opted for the same protocol, consumers could have reduced their equipment costs somewhat. There may be advantages, though, in consumers not being prisoners of a single technological choice over which they would have had no control.

However, the research costs could easily be deflated. The providers' undeniable creativity in inventing myriad options, packages and bundles produces markets resembling a jungle. Intimidated, the consumer searches little, briefly and without confidence. He might get lost if he tried harder.

It would be absurd to legislate so as to reduce or standardize the offers. Absent the providers devising their proposals from the customer's point of view, other efforts could be made to simplify things a little. For example, the CRTC could make itself useful by creating or imposing for telecommunications services a tool resembling those used by the Financial Consumer agency of Canada to help consumers find the banking package or credit card that best meets their needs³⁵¹.

Opacity costs could also be significantly reduced: Providers would only have to tell consumers the value of those "discounts". Consumers could then more easily choose payment and depreciation methods.

Contract term and cancellation penalties are manifestly departure costs. Cancellation fees, which can be particularly high, should be clearly revealed to the consumer before the contract is signed. It would of course be desirable that fees not exceed the costs incurred by the merchant because of cancellation. For instance, it seems obvious that fees not modulated according to the period remaining in the contract, as well as fees representing the consumer's execution of the entire contract, do not meet this requirement.

³⁵¹ At www.acfc.gc.ca/fra/consommateurs/IOutils/default.asp.

Any consumer law advocate who considers the contractual terms imposed by Canadian telecommunications service providers comes away flabbergasted. Those documents are teeming with clauses contrary to the spirit, and very often the letter, of the laws in effect³⁵².

The contracts we have examined don't stand up to the requirements of the laws in Quebec, Ontario and Saskatchewan. Many of the contracts could likely be attacked because they're unclear or because the merchant neglected to mention important facts. And yet, providers regularly impose such contracts on their subscribers, who don't have the necessary expertise to detect their flaws, or to know what they could dispute, or how to do so.

More generally, several of the provisions we examined in the preceding pages establish a deeply asymmetric relation between the parties. The consumer is prisoner of a contract the provider can amend at its discretion or cancel, while incurring no penalty. Contract terms are frequently long, exceeding 24 months in many cases; penalties are onerous and their amount is not always – or at least not manifestly – related to the level of prejudice actually suffered by the provider.

Again, Canadian legislation is less severe than that of the United Kingdom and France, where regulatory or legislative authorities have intervened to tighten up the rules, notably regarding the term of contracts and the severity of penalties. In our overview of French and British private law, we've seen that certain contractual provisions of the type we have observed would simply be inadmissible and invalid. We have a long way to go. Among other things, a comparison between Ofcom's behaviour and that of the Canadian authorities, in terms of monitoring market behaviour, can only provoke the envy of Canadian consumers and their representatives.

It isn't good for the law when laws are flouted. It isn't good for the markets when avoidable departure costs are maintained and amplified by business practices, particularly contractual ones, that establish asymmetric and unfair relations between providers and subscribers. The importance of the telecommunications markets for the economy and consumers, along with the disorders we detect in them, should evidently induce the authorities to make it a priority to examine those markets.

B - The Actors' Viewpoint

We have attempted to find out what consumers think about barriers to changing telecommunications service providers, and how government authorities and providers react. To that end, we've used three distinct tools.

First, the Office de la protection du consommateur du Québec receives each year tens of thousands of complaints from dissatisfied consumers, in practically every field of economic activity. We were able to examine some of those complaints, which originate from everywhere in Quebec.

Then, Union des consommateurs conducted an in-house survey of its mailing list subscribers. We thus gathered the perceptions of more than a thousand consumers, essentially from Quebec.

³⁵² On the whole, the contracts of the Sasktel public corporation and the Access Communications cooperative are slightly less unfair, but a few improvements should be made there too.

Finally, we addressed ourselves to representatives of the three provinces that were part of our sample, and to the heads of most of the companies whose practices we examined. The few answers we obtained contain some interesting facets.

1 - COMPLAINTS RECEIVED BY THE OFFICE DE PROTECTION DU CONSOMMATEUR

The Quebec’s Office de la protection du consommateur (OPC) graciously allowed us to consult part of the register of complaints about telecommunications services from April 1, 2003 to February 27, 2008³⁵³. This straw poll conducted by consulting a file of 2,636 complaints reveals interesting trends.

Having deducted complaints that were irrelevant to our market study (regarding, for example, cable television, satellite television, the sale of electronic appliances) and a few duplications, as well as complaints not related to barriers, we retained 343 complaints, i.e., 13.01% of the complaints consulted. A first finding is that the proportion of relevant complaints appears to increase from year to year:

Table 5
Complaints about barriers to the fluidity of the telecommunications market
 in proportion to total complaints about the market
 in OPC complaint files (number and %)

	2007-8	2006-7	2005-6	2004-5	2003-4
Telecom complaints	582	353	446	472	783
Complaints - barriers	107	55	64	45	72
Proportion (%)	18.4	15.6	14.3	9.5	9.2

Whereas the total number of complaints in the sector diminished from 2003 to 2007, it has jumped in 2008. The proportion of complaints about barriers to changing providers has in fact doubled in the past five years.

Penalty clauses, contract term issues, unilateral amendments made by providers, and dissatisfaction with representatives’ confusing or misleading statements particularly raise the ire of Quebec consumers who find themselves trapped in contracts that don’t give them what they thought they were entitled to.

³⁵³ It should be noted that the information consulted identified the company concerned, but did not contain personal information about consumers. The information consulted consisted mainly of a brief summary of consumer complaints.

Table 6
Main types of complaints about barriers to mobility
 and proportion of total complaints
 (2003-2008)

Type of Complaints	Number	Proportion (%)
Penalty clauses	135	39.4
including: service problems	60	17.5
other cases	75	21.9
Contract term	85	24.8
including: vagueness	40	11.7
involuntary extensions	24	7.0
tacit rollover	21	6.1
Unsatisfactory information	61	17.8
including: misleading representations	46	13.4
confusion or omission	15	4.3
Unilateral amendments	49	14.3

These four major categories alone thus cover 96.3% of total complaints about barriers to mobility³⁵⁴.

135 persons complained about penalties, or the provider's desire to impose them, for early contract termination. In 60 of those cases, the consumer wanted to terminate the contract because he wasn't receiving services agreed to. The most frequent examples concern the subscriber's inability to use his mobile telephone because he resides in a poorly serviced area. Even in those cases, the provider imposes a penalty, whose amount is often considerable, sometimes from \$400 to \$900, even \$1,200.

In the 75 other cases where the consumer wanted to terminate his contract and where the provider wanted to impose a penalty, the particular circumstances are sometimes unknown: subscribers often say they're fed up with poor customer service or don't receive services they think they're entitled to under their contract.

In some cases, the penalty imposed is clearly greater than what had been agreed to between the parties (for example: a verbal agreement for a penalty equivalent to a monthly payment, followed by a bill for \$732.08) and even than the amount written in black and white in the contract. Some companies impose penalties when the consumer cancels eight or even two days before the end of the contract (even though the monthly payment has already been made). Receiving invoices after being promised four months of service free of charge, a consumer cancels his contract; the cancellation results in a \$888 penalty. A provider sends a free mobile telephone to a consumer who never asked for it; the consumer returns the phone and is penalized \$278.

A consumer subscribes to Internet access service. The provider admits that technical limitations prevent it from offering the service, and the parties agree to terminate the contract. A few months later, the provider improves its network and can begin servicing that customer; without warning, it sends him a \$172.54 cancellation bill.

³⁵⁴ Some complaints were, however, listed under more than one category, because of the different aspects reproached by complainants.

It's often just when he wants to migrate that a subscriber is informed that he's bound to a contract longer than he thought. Misunderstandings are possible; but the frequency of such complaints in the OPC files is surprising. Tacit rollovers can also produce surprises: a consumer whose initial contract dated from 1996 was penalized \$150 in 2008 for canceling his contract.

It also happens that the provider "resets the counter to zero" at each amendment to the contract reached between the parties. For example, the subscriber only has to accept a new mobile telephone offered by the company for the original contract to be replaced by a new contract of 12, 24 or 36 months, without the consumer being so informed.

The contract term would hurt less if consumers had the impression of receiving what they expected. 46 consumers allege that they were victims of false representations about essential components of the agreements of which they are now captive and which they would not have signed had they been properly informed. A consumer who had been assured that her telephone would operate in two areas – which was not the case – was imposed a penalty of \$285.64 when she wanted to cancel.

In a half-dozen cases, a provider pledged to assume the penalties imposed by a competitor, but did not do so. In another half-dozen cases, the consumer was offered a service trial period, and then learned that he was bound by a long term contract.

The fact that providers reserve the right to unilaterally amend technical features, contractual terms or the prices of services provided (and that they avail themselves of that right) irritates consumers a great deal; they get the impression that they are the only party bound by the contract. To a consumer who expresses too much dissatisfaction, companies too often propose only cancellation... accompanied by a penalty.

Let's report a few other choice examples. One provider categorically refuses to terminate a contract, penalty or no. Another demands \$100 fees to accept the portability of the mobile telephone number. A third recommends, to a subscriber who wants to migrate, to "carry over" his number a few days after the end of the first contract, "to avoid losing it": the incumbent provider is obviously imposing a cancellation penalty. In four cases, the consumer provides prior notice of non-renewal of a contract, in accordance with the provider's procedures, and then finds his contract renewed regardless; he can't free himself from that second contract without paying a penalty.

We haven't taken into account the too-numerous billing problems related to the administrative difficulties of a major provider in the Quebec market, nor the claims that jump like a rabbit out of a hat years after the end of a contract, nor cases of aggressive recovery on behalf of telecommunications service providers. A great many consumers feel trapped by disappointing contracts that are difficult to escape; this alone explains much of the diffuse but common discontent with telecommunications service providers and their barriers to migration.

Other sources confirm the persistence of consumers' evident dissatisfaction. Documents introduced in evidence before the CRTC by service providers also allude to this

dissatisfaction: data presented by the providers indicate that migration is often due to factors such as “poor service quality”³⁵⁵.

In 2006, the Canadian *Better Business Bureau* network processed 35,971 complaints. Among the ten industrial sectors that were the target of the largest number of complaints, Internet service providers come in fourth place, mobile telephony providers in eighth place, and wired service providers in ninth place³⁵⁶. Complaints about mobile telephony are also at the top of the complaints list drawn by the Ontario Ministry of Government Services in 2004 and 2005³⁵⁷.

2 - THE UNION DES CONSOMMATEURS' INVESTIGATION

Union des consommateurs conducted a survey of persons registered for its mailing lists, in order to measure their perceptions and the possible effect of barriers to changing telecommunications service providers.

More than one thousand three hundred persons responded to the survey between January 28 and February 15, 2008. Given notably the sampling method, the results of this survey obviously can't be extrapolated to the population as a whole. The sample's characteristics and the coherence of its results, however, certainly make this straw poll relevant.

The sample is 68.3% male³⁵⁸, highly schooled³⁵⁹ and quite prosperous³⁶⁰. The regional distribution of respondents who indicate their provenance is as follows:

³⁵⁵ CRTC. *Telecom Decision CRTC 2006-16*, *op. cit.*, §§ 119-120.

³⁵⁶ Canadian Council of Better Business Bureaus. *Press release: Top ten inquiries and complaints for 2006*. March 2007. 1 p. The document is available at http://ccbba.ca/documents/2006TopTenComplaints_000.pdf.

³⁵⁷ Industry Canada – Competition Bureau. *The Expansion of Cellphone Services*. Ottawa, fall 2006. 12 p. P. 7. Available at [www.ic.gc.ca/epic/site/oca-bs.nsf/vwapj/CTUCellen.pdf/\\$FILE/CTUCellen.pdf](http://www.ic.gc.ca/epic/site/oca-bs.nsf/vwapj/CTUCellen.pdf/$FILE/CTUCellen.pdf).

³⁵⁸ In the summary that follows, percentages are determined by the number of respondents to the specific question: for example, 183 respondents did not indicate their gender.

³⁵⁹ Holders of a college (33.9%) or university (37.1%) degree comprise more than two-thirds (71%) of the sample.

³⁶⁰ Respondents whose annual household income exceeds \$50,000 represent 56.3% of respondents who indicated their income; respondents whose income exceeds \$100,000 represent 11.9%.

Table 7

Provenance of respondents to the Internet survey
by clusters of forward sortation regions
and proportion of the total

Region or Locality	Number	%
Non-urban Eastern Quebec	34	3.1
Quebec City	101	9.2
Charlevoix	14	1.2
South Shore	11	1.0
Quebec City suburbs	24	2.2
Saguenay/Lac-St-Jean	59	5.4
Maurice/Central Quebec	8	0.7
Montreal Island/Laval	298	27.2
Non-urban Western Quebec	88	8.9
Estrie	42	3.8
Drummondville/Granby*	36	3.3
Montérégie East	69	6.3
Longueuil*	51	4.7
Repentigny*	53	4.8
Châteauguay, Joliette*	57	5.2
Mascouche, Valleyfield*	82	7.5
Lower Laurentians/Ottawa Valley	30	2.7
High Laurentians/Abitibi	14	1.2
Ottawa	2	0.2
Total	1095	

Practically all the respondents come from Quebec. A little more than one-quarter come from Montreal Island and Laval, and 22.2% come from Montreal's sprawling suburban areas; 11.4% come from Quebec City and its relatively nearby suburbs. The territorial distribution is thus quite faithful to that of the Quebec population, and at the very least sufficient to make this sample useful.

91.6% subscribe to wired telephony service and/or Internet access (93.2%), and 75,0% use a mobile telephone. We note that Internet access is more universal in this sample than wired service, thus suggesting migration toward mobile telephony from wired telephony; this development could spread to other parts of the population.

Given their use of many services, it's not surprising that respondents are seduced by bundles: 70.3% of respondents said they benefited from discounts because some of their services (wired telephone, mobile telephone, Internet or television) are obtained from a single provider. Moreover, the respondents are quite loyal to their providers, as these two tables indicate:

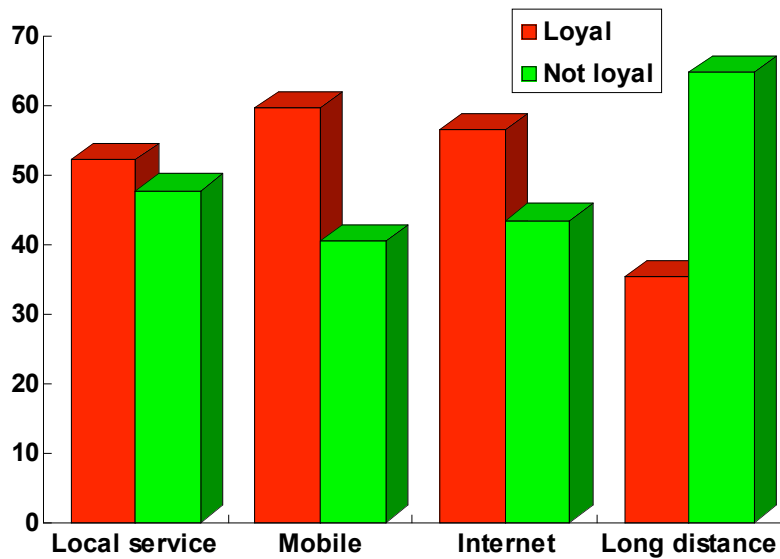
Table 8

**Term of the current relation with a provider
by telecommunications service (%)**

Service	+5 years	5 years	4 years	3 years	2 years	1 year
wired	47.3	1.6	2.0	8.7	16.6	23.8
mobile	37.5	7.7	9.2	11.7	13.7	20.2
Internet	50.1	6.6	6.9	9.6	12.2	14.6
Long distance	37.0	3.1	4.6	11.2	20.0	24.1

Table 9

**Level of loyalty to a provider
by telecommunications service (%)**



Let's examine these results more closely, beginning with Table 8. 50.9% of respondents subscribing to wired service have been doing business with their provider for at least four years. But it should be noted that 23.8% of respondents have been doing business with their current provider for barely one year. Given that local service competition has just begun in several regions, that may be an indication that this market will be relatively fluid in coming years: the contracts of incumbent providers are indeed generating less departure costs than are other contracts.

54.4% of respondents subscribing to mobile service have been loyal to a single provider for at least four years. That term exceeds the term set in principle by most supply agreements in this field. Of course, that term is sometimes extended when equipment is updated, for example, but we can assume that many consumers choose to remain with their provider after the initial contract expires. This may result from other departure costs, the absence of competition, or simply satisfaction with that provider.

Internet users are even more likely to be loyal: half haven't changed providers in at least 5 years, and 63.6% have kept the same access service for at least four years. Here again,

stability may be attributable to departure costs, but also to a sufficient level of satisfaction with the service.

By comparison, we also wanted to evaluate the mobility of long distance service customers. In that long-competitive market, we observe the opposite trend: 55.3% of users in this area have kept their contractual relation for at most three years.

These results are confirmed in table 9. If only one-third of subscribers have always done business with the same long distance provider, there's a high level of migration. We also note that 35.2% of respondents have always had the same long distance provider (i.e., the incumbent wired service provider, in most cases) and that 37% of respondents have had the same provider for more than five years: apparently, there's a very stable pool here of about one-third of the clientele, beyond whom the market is much more fluid³⁶¹.

On the other hand, 52,6% of wired service users have never changed providers. Again, this is likely explained in large part by the recent and relatively limited entry of competitors in local markets.

Surprisingly, 59.5% of mobile service subscribers still do business with the same provider. This may be explained in part by the relatively recent growth in the number of subscribers and by the effect of departure costs. Nevertheless, 66.1% of respondents said they'd had the same mobile service provider for three or more years. This loyalty can thus only be the result of the overabundance of new captive customers due to cancellation penalties.

Internet subscribers also show a high level of loyalty: 56.5% have never changed providers.

Is this admirable consumer loyalty toward the three types of services under study here simply blind loyalty? Apparently not. The majority of consumers have in fact considered changing providers, without doing so. The proportion of subscribers who have considered disloyalty totals 52% for wired telephony, 55.6% for Internet access and 53% for mobile services.

Certain factors may have restrained their enthusiasm. Indeed, the respondents identified the restrictions that prevented them from changing providers:

³⁶¹ This data should not be compared, since the number of respondents to the two sub-questions was not the same.

Table 10
Principal migration obstacles
 identified by respondents
 and proportion of respondents (%)³⁶²

Obstacle	Proportion of respondents
Cancellation fees	71.0
Long-term contract	64.1
Activation fee	51.0
Installation fee	50.3
Absence of competitors	47.6
Purchase of a new device	43.1
Ignorance - renewal	36.9
Obligation to subscribe to a bundle	34.9
Loss of bundle advantages	34.2
Change of telephone number	32.9
Loss of accumulated advantages	30.4
Change of Internet address	25.1

The four factors identified most often can be grouped into two categories: barriers related to contract term and penalties are of course most important³⁶³; and issues related to fees come in three of the first four ranks. Clearly, contractual departure costs pose major obstacles to customer mobility.

The absence of competitors also plays a significant role. Almost half of respondents to this question indicated that their desire to migrate was frustrated by the practical inability to address themselves to another subscriber.

Bundle issues are also important. Consumers abstain from migrating because of the obligation to subscribe to a set of services in order to obtain a specific service, or because of they would lose the advantages of other bundle components. More than one-third of respondents identified each of these factors among those that restrained them. More than one-third of respondents have also chosen not to migrate because they would lose financial advantages, for example those accumulated in loyalty programs.

We evoked above the role of bundles. 70.3% of respondents said they benefited from a discount because some of their services were grouped with the same provider. The considerable popularity of those services likely strengthens the relations between a provider and its subscriber. In contemplating the state of the market, we can indeed appreciate the nightmare of simultaneously searching for a new provider of two, three or four services.

Moreover, the impact of migration on personal coordinates such as phone number, e-mail address of Web site address appears to constitute a real, though less serious, barrier to

³⁶² We listed 984 respondents to this question, all services taken together. Multiple answers were allowed. Our table does not reproduce the results of 2 categories.

³⁶³ To this type of concern should be added the finding that 36.9% of respondents said they were poorly informed about their contract renewal terms.

customer mobility. Telephone number portability should significantly reduce the importance of this concern in coming years.

After asking respondents to identify past obstacles to their migration, we then asked what factors might restrict their mobility in the future. The same factors, in the same order, were evoked. The effect of bundles is, however, mentioned by more than half of respondents. Surprisingly, 70.9% of respondents still identify the need to change telephone numbers as a potential obstacle (48.5%: certainly, 22.4%: possibly): Evidently, consumers are still poorly informed about portability regulations, and that ignorance ensures their loyalty³⁶⁴.

Whereas 50.5% of respondents say they rely on the media for information about barriers to mobility, 41.1% say they rely on reading their contracts. Only 36.8% report that they're informed by provider representatives, one of whose duties is precisely to inform their customers³⁶⁵.

In closing, we asked whether, in respondents' view, the various technologies offered by service providers had an impact on the reliability and security of residential telephony and Internet access. Almost half of respondents – 48.3% – answered “yes” regarding residential telephony. Curiously, this is a concern for 60.1% of respondents regarding Internet access. Among respondents who think that technological differences affect the reliability and security of residential telephony, 58% mention the media as a source of information on technological differences and their possible effects; 52.5% estimate that those differences affect the reliability and security of Internet access. 33.6% and 32%, respectively, obtain their information... from advertising. A good number, though, also obtained information by reading the technical specifications of the various technologies (42.2%) or specialized articles (38.3%), or by using the technologies (29.5%). These proportions are even higher among those who consider technological difference as an influence – for the Internet, reading technical specifications: 50.2%, reading specialized articles: 44.6% and using the technologies: 35%; for telephony, reading technical specifications: 46.5%, reading specialized articles: 43.8% and using the technologies: 34.6%³⁶⁶.

3 - PROVIDERS AND GOVERNMENTS

We addressed ourselves to Quebec, Ontario and Saskatchewan government representatives associated with the work of the Consumer Measures Committee, and to Access Communications, Bell, Cogeco, Rogers and Vidéotron representatives, in an attempt to understand their perceptions of barriers to customer mobility.

On the Quebec side, the Office de la protection du consommateur (OPC) considers that cancellation penalties and equipment compatibility problems constitute barriers to mobility. The OPC maintains few contacts with other government organizations with regard to these issues, except, occasionally, with the CRTC itself. The OPC is currently examining possibilities for reforming the *Consumer Protection Act* to adapt it to changes in business practices since its adoption in 1978. As for the ministère de la Culture et des Communications, it doesn't generally examine issues such as the state of competition or departure costs.

³⁶⁴ This question was clearly distinct from the one concerning the effect of changing e-mail addresses or Web site addresses.

³⁶⁵ It was possible for respondents to indicate several information sources.

³⁶⁶ It was possible for respondents to indicate several information sources.

The answer we received from a representative of the Ontario Ministry of Government and Consumer Services deserves to be quoted in its entirety:

As we are not a competition law body, nor one with specific regulatory oversight of the telecommunications sector, we do not have policies or information on the issues you ask about.

We support the view expressed by some academics over the years that consumer law and competition law are complementary and mutually supporting fields of policy required to provide a framework for an efficient market that abides by its own principles and those of contract law.

Being a provincial consumer protection authority, our approach on competition issues is generally that we attempt, in creating consumer law, not to inadvertently compromise competition or authorize/require anti-competitive conduct. For example, we seek to avoid creating unnecessary barriers to entry into a field or giving undue advantage to one business format over another.

Moreover, we still await an answer from representatives of the Saskatchewan Department of Justice.

The Bell Canada Group and Cogeco Group representatives we contacted also declined our offer to participate in our work.

According to the executive of the cooperative Access Communication whom we contacted, insufficient available information and the obligation to acquire equipment are not significant barriers to customer mobility. While recognizing that it's difficult for consumers to compare the terms and conditions of the various bundles offered on the market, he thinks that the loss of bundle advantages and the cancellation penalties do have a restraining effect. Reminding us that his main competitor is a Crown corporation, he emphasized that major public pressure induces residents to support a public corporation and a unionized employee. In his view, the perceptions of consumers hostile to cancellation penalties could be mitigated by efforts at complete disclosure of required information before the conclusion of a contract providing for such penalties.

The Rogers executive who participated in our survey also thinks that insufficient available information and the obligation to acquire equipment are not significant barriers to customer mobility, but that the loss of bundle advantages and the cancellation fees can constitute such obstacles. He also mentioned that the inconveniences of changing an e-mail address can restrict the mobility of subscribers to Internet access services. As for cancellation fees, he pointed out that consumers can avoid them by choosing products offered by open-ended contracts. In his view, consumers have no difficulty comparing the terms and conditions of the various bundles on the market.

At Vidéotron, it is recognized that lack of information on the presence of other providers, loss of bundle advantages, the need to acquire new equipment, and cancellation penalties are all factors that can restrict consumer mobility. However, it is thought that consumers can quite easily compare bundles, but that this is more difficult with regard to contractual clauses, notably penalty clauses.

VI - CONCLUSION

The situation in the Canadian telecommunications service markets is similar to that in many other countries: competition is uneven, incumbents restrict customers, departure costs are present and they are unpopular when more visible. However, blind faith in market forces as sufficient to settle all problems appears stronger here than in countries such as the United Kingdom and France. Indeed, Ofcom's active concern about the impact of departure costs on market developments, the rigor of its analysis and the vigor of its interventions contrast with the CRTC's attitude. The means made available there to government authorities and consumer associations by competition law have little in common with the Canadian framework. Following the example of the British authorities, the French adjudicative bodies and legislators are clearly concerned about the fate of telecommunications service consumers and refuse to abandon them to the sole and uncertain success of markets. Structurally and in terms of individual relations between provider and subscriber, France establishes measures to restore balance.

An examination of business practices in Canada and of complaints or expressions of discontent from consumers leads to the conclusion that migration in the telecommunications service markets remains difficult. The Canadian consumer cannot always change providers, or doesn't want to, notably because:

- *competitors are too few or absent locally;*
- *the information he has to process to make a choice or adapt to new services and products resembles a jungle;*
- *the specific prices and services that interest him are not always possible to determine;*
- *the penalties he would have to pay intimidate him;*
- *the equipment, software or commercial advantages restrain him;*
- *he finds it convenient to have all his needs met by a single provider.*

The barriers' existence is undeniable: they are multiple, at times cumulative, and not always perceptible and measurable, at least at the moment when the consumer chooses to do business with a given provider. In many cases, they could also be avoidable or at least significantly attenuated.

Consumers are not delighted. The industry counters that their annoyance is due to misunderstanding, since information is abundantly available. But there may be at once too much and too little information presented to those who want to find the right service for them: providers list hundreds of different combinations, while indicating poorly or not at all the price of each component, the actual value of advantages granted, and the extent of penalties, among other setbacks, that can befall subscribers.

The abundance of complaints raises suspicions that the consumer doesn't face markets operating optimally. Interventions should thus be considered to make contractual relations healthier.

Does the undeniable presence of departure costs and other barriers to demand mobility in Canadian telecommunications service markets constitute a macro-economic problem, notably with regard to a sound competition policy? Several findings of our study suggest that they do; in-depth research on this issue would be warranted.

It should be recognized that competition in Canada is in fact quite weak, even though rivalry appears vigorous.

Evidently, the competitors advertise noisily. They bitterly compete over the shares of a few ever-growing markets, before these mature, but probably more to attract customers and hold them captive by substantial departure costs and the like. In addition, Canadian prices are too high, while the few successful new entrants on the market benefit to a certain extent from an “umbrella effect” from established players. The convergence of packages toward relatively similar bundles can also lead to excessive supply in certain niches, and insufficient supply in others where innovation would nevertheless be welcome. In addition, the proliferation of bundles risks crowding out small single-line providers while favoring excess if not superfluous supply in some niches.

As in other sectors of the North American economy over the past thirty years, we may witness in the Canadian telecommunications industry a passage from regulated monopolies to unregulated oligopolies. In more-lucrative markets, that could generate complacent behavior, if not conscious parallelism; in less-profitable markets, the result could be the maintenance of local monopolies or competitors dependent on the bottlenecks controlled by major providers. Here or there, we’ll find competitors succeeding in very specific niches, indicating market over-segmentation.

At first sight, all this may look like the operation of vigorous and competitive markets, but a rigorous economic analysis may demonstrate that they are relatively inefficient. Vigorous rivalry doesn’t necessary imply sound competition, nor that markets are correctly playing the regulatory role ascribed to them by neoclassical economic theory. It would be opportune for our political and regulatory authorities, notably at the federal level, to become aware of this and worry about current trends. The Treaty founding the European Community, used by a model by several member nations of the European Union, has instituted a regulatory framework regarding dominance abuses that has proved effective. In the United States, anti-competitive practices are more easily attacked. The United Kingdom has also established mechanisms, such as the right of associations to act in the interest of consumers, in order to ensure healthy competition. Given the importance, in enabling consumers to benefit from the advantages of free market forces, of ensuring that telecom markets are healthy, the competition framework established abroad could serve as a model for Canada.

A purely rational consumer, all-knowing and with nothing else to do, might of course decipher our markets. Unfortunately, such a consumer doesn’t exist. The economy and the law are beginning to realize this theoretically³⁶⁷. Surely, the regulatory organizations and legislators should begin to take those reflections into account.

The issue is a serious one, and remedies are possible. Certain institutions are already in place in Canada, and solutions devised here or elsewhere can be adapted and, most importantly, applied. It’s important to tighten up the rules and apply them strictly so as to effect a balance between telecommunications service providers and consumers, and to put an end to the abuses.

³⁶⁷ For example, Becher, Shmuel. *Behavioral Science and Consumer Standard Form Contracts*. [2007] 68 Louisiana Law Review 117.

VII - RECOMMENDATIONS

With regard to provincial authorities, Union des consommateurs recommends:

1. that the Consumer Measures Committee focus on issues of competitiveness and departure costs in Canadian telecommunications markets;
2. that provincial legislative and regulatory measures regarding contractual equity be reviewed and improved as necessary, and be vigorously enforced in contracts between telecommunications service providers and consumers;
3. that legislative measures be adopted in all provinces to adequately regulate unfair clauses in adhesion and consumer contracts;
4. that legislative measures be adopted in all provinces to regulate the term of telecommunications fixed term service contracts, as well as cancellation penalties;
5. that measures be established to ensure consumer access, in a clear form and before the conclusion of any telecommunications service contract, to necessary information for evaluating prices and services, their breakdown, discounts and penalties;
6. that measures be established to ensure that the sale of services that are technically dissociable is not permitted in grouped form unless they are also available separately under competitive terms and conditions;
7. that legislative measures be adopted in all provinces to ensure that advantages obtained through loyalty or prepayment programs are always redeemable or exchangeable;

With regard to the federal authorities, Union des consommateurs recommends:

8. that Parliament conduct an in-depth review the provisions of the *Competition Act* with respect to abuses of dominance;
9. that the CRTC conduct periodically, and at least every three years, a study on departure cost behavior in Canada's deregulated telecommunications markets;
10. that the CRTC require providers to launch effective information campaigns so that all consumers be adequately informed of their right to telephone number portability;
11. that the CRTC establish and update a mechanism for comparing the offers of telecommunications service providers;

With regard to telecommunications service providers, Union des consommateurs recommends:

12. that they endeavor to simplify their offers and make essential terms and conditions clearer, including the value of discounts, contract term, and penalties;
13. that they conduct an in-depth review of their service terms and conditions, to make them truly comply with applicable laws in each province;
14. With regard to consumers, despite the substantial challenge, Union des consommateurs recommends:
15. that they endeavor to look for products and services that best meet their needs;
16. that before signing agreements, they inform themselves systematically about the actual extent of "discounts", cancellation terms and potential costs;
17. that in the event of disputes, they inform themselves adequately about their rights and complain before all appropriate authorities.

ANNEX 1

Service Providers in Certain Markets

ONTARIO			
City	Service	Companies offering the service	Companies not offering bundles including wired telephony or wired/cable Internet
Toronto	Wired telephony	Bell, Rogers, Telus ³⁶⁸	
	Mobile telephony	Bell ³⁶⁹ , Telus, Rogers, Fido	Fido, Telus ³⁷⁰
	High-speed Internet	Bell, Rogers, Telus ³⁷¹	
Ottawa	Wired telephony	Bell, Rogers	
	Mobile telephony	Bell, Telus, Rogers, Fido	Fido, Telus
	High-speed Internet	Bell, Rogers	
Sudbury	Wired telephony	Bell Aliant, The Amazing Persona	
	Mobile telephony	Telus, Rogers, Bell, Fido	Fido, Telus
	High-speed Internet	Bell, The Amazing Persona	
Sault-Ste-Marie	Wired telephony	Bell Aliant, The Amazing Persona, Shaw ³⁷²	
	Mobile telephony	Telus, Rogers, Bell, Fido	Fido, Telus
	High-speed Internet	The Amazing Persona	
Kingston	Wired telephony	Bell, Cogeco	
	Mobile telephony	Bell, Rogers, Telus, Fido	Fido, Telus
	High-speed Internet	Bell, Cogeco	

³⁶⁸ Telus is the provider in a large-scale residential development project called CityPlace in the heart of downtown Toronto. It also offers high-speed Internet access. See: <http://www.mytelus.com/cityplace/index.vm>.

³⁶⁹ In this table, Bell Mobility's wireless telephone service is identified as Bell.

³⁷⁰ Except at CityPlace.

³⁷¹ See note 1.

³⁷² Shaw has been offering the service since January 23, 2008.

QUEBEC			
City	Service	Companies offering the service	Companies not offering bundles including wired telephony or wired/cable Internet
Montreal	Wired telephony	Bell, Vidéotron, Rogers,	
	Mobile telephony	Bell, Vidéotron, Rogers, Telus, Fido	Fido, Telus
	High-speed Internet	Bell, Vidéotron, Rogers	
Quebec City	Wired telephony	Bell, Vidéotron	
	Mobile telephony	Bell, Vidéotron, Rogers, Telus, Fido	Fido
	High-speed Internet	Bell, Vidéotron	Fido, Telus
Rimouski	Wired telephony	Telus, Cogeco	
	Mobile telephony	Telus, Bell, Rogers, Fido	Fido, Bell
	High-speed Internet	Telus, Cogeco	
Rouyn	Wired telephony	Télébec ³⁷³	
	Mobile telephony	Télébec, Telus, Rogers, Fido	Fido, Telus
	High-speed Internet	Télébec, Ondenet ³⁷⁴	
Trois-Rivières	Wired telephony	Bell, Cogeco	
	Mobile telephony	Bell, Rogers, Telus, Fido	Fido, Telus
	High-speed Internet	Bell, Cogeco	

³⁷³ Télébec is an entity belonging to the Bell Aliant trust. Télébec also owns the cable television company Cablevision.

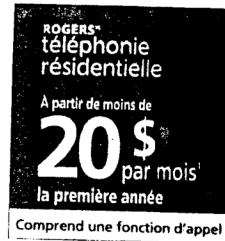
³⁷⁴ Ondenet is reselling the service it has purchased from Télébec.

SASKATCHEWAN			
City	Service	Companies offering the service	Companies not offering bundles including wired telephony or wired/cable Internet
Regina	Wired telephony	Sasktel, Access Communications	
	Mobile telephony	Sasktel, Telus, Rogers, Fido	Fido, Telus
	High-speed Internet	Sasktel, Access Communications	
Saskatoon	Wired telephony	Sasktel, Shaw	
	Mobile telephony	Sasktel, Telus, Rogers, Fido	Fido, Telus
	High-speed Internet	Sasktel, Shaw	
North Battleford	Wired telephony	Sasktel, Access Communications	
	Mobile telephony	Sasktel, Telus ³⁷⁵ , Fido	Fido, Telus
	High-speed Internet	Sasktel, Access Communications	

³⁷⁵ On this part of the territory, Telus offers analog service only.

ANNEX 2

Flyer from the Rogers Group



Profitez d'un excellent service résidentiel conçu pour vous.
Passez à la Téléphonie résidentielle de Rogers
et économisez 120 \$ la première année!

Madame, Monsieur,

Si le fait de garder le contact avec votre famille et vos amis vous tient à cœur, la Téléphonie résidentielle de Rogers est la solution toute désignée pour vous.

Vous pouvez profiter d'économies de 120 \$.

En passant à la Téléphonie résidentielle de Rogers, vous paierez moins de **20 \$ la première année**¹ (pour le forfait comprenant une fonction d'appel au choix). Cela représente **une économie de 120 \$**.

La Téléphonie résidentielle de Rogers est synonyme de choix, de souplesse et d'un excellent rapport qualité-prix.

La Téléphonie résidentielle de Rogers vous offre les mêmes services auxquels vous êtes habitué, y compris les services 9-1-1 et 4-1-1. Vous pouvez choisir les fonctions d'appel et le forfait d'interurbain qui vous intéressent et ainsi ne payer que pour les services dont vous avez besoin. De plus, vous avez la possibilité de modifier vos choix au fur et à mesure que vos besoins changent. Grâce à Rogers, vous obtenez ce dont vous avez besoin tout en économisant chaque mois.

Vous pouvez faire des appels interurbains sans frais.

Vous pouvez désormais appeler sans frais d'autres abonnés de Rogers Sans-fil, de la Téléphonie résidentielle de Rogers ou de Fido® partout au pays grâce à la Téléphonie résidentielle de Rogers! Vous pouvez appeler en tout temps, sans payer de frais d'interurbain. Il ne s'agit pas d'une offre d'une durée limitée, mais bien d'un service permanent. Voici une raison de plus de passer à la Téléphonie résidentielle de Rogers pour économiser.

Passer à Rogers est un vrai jeu d'enfant.

Passer à la Téléphonie résidentielle est facile et sans tracas. Vous pouvez conserver votre numéro de téléphone, l'installation est sans frais, et nous prenons les dispositions nécessaires auprès de votre fournisseur de service résidentiel. Vous pouvez aussi profiter du service de soutien technique 24 heures sur 24, sept jours sur sept, offert par notre équipe de professionnels. Grâce à la Téléphonie résidentielle de Rogers, économiser 120 \$ n'aura jamais été aussi simple.

Nous espérons que vous profiterez de cette occasion pour passer à la Téléphonie résidentielle de Rogers pour commencer à économiser. Il suffit de composer le **1-800-971-7633** dès aujourd'hui. De plus, en groupant votre service Téléphonie résidentielle de Rogers avec les autres services de Rogers auxquels vous êtes abonné, vous pouvez économiser sur tous vos services!¹

Veuillez agréer, Madame, Monsieur, l'expression de nos sentiments les meilleurs.

Phil Hartling
Vice-président et directeur général
Téléphonie résidentielle de Rogers

P.-S. : Passez facilement à Rogers et obtenez un excellent service résidentiel conçu pour vous tout en profitant d'une économie de 120 \$. Composez le 1-800-971-7633 dès aujourd'hui.

Composez le 1-800-971-7633 ou consultez rogers.com/telephonieresidentielle pour profiter d'un excellent service résidentiel conçu pour vous.

1 ✓ **Passez au service Téléphonie résidentielle de Rogers.**

- Moins de **20 \$** par mois¹ la **première année**, et une fonction d'appel au choix (ce qui représente une économie de 120 \$).
- Obtenez un crédit de 20 \$ en prime en vous abonnant en ligne à la Téléphonie résidentielle de Rogers.

Consultez rogers.com/telephonieresidentielle pour obtenir de plus amples renseignements sur cet excellent service résidentiel conçu pour vous.

2 ✓ **Choisissez la fonction d'appel qui fera partie de votre service et ajoutez n'importe quelle autre fonction d'appel pour seulement 4 \$ par mois.**

- Affichage des appels
- Appel en attente
- Boîte vocale de base
- Refus d'appel anonyme
- Renvoi d'appel
- Filtrage des appels (jusqu'à douze numéros)
- Conférence à trois
- Retour d'appel – occupation / dernier appel

Consultez rogers.com/telephonieresidentielle pour obtenir de plus amples renseignements au sujet des fonctions d'appel.

3 ✓ **Choisissez le forfait d'interurbain qui répond à vos besoins.**

- Forfait Allô le Monde^{MC}**
5 ¢ la minute pour les appels effectués en Amérique du Nord et tarifs internationaux concurrentiels offerts 24 heures sur 24, sept jours sur sept.
- Forfait Total Amérique du Nord**
Pour ceux qui veulent profiter d'appels interurbains illimités partout en Amérique du Nord 24 heures sur 24, sept jours sur sept.⁴

Consultez rogers.com/telephonieresidentielle pour obtenir une liste complète de forfaits d'interurbain et de descriptions.

4 ✓ **Abonnez-vous à une offre groupée Excellent choix^{MC} et économisez encore plus sur vos services de Rogers.**

- Groupez votre service Téléphonie résidentielle de Rogers avec vos autres services de Rogers et économisez encore plus chaque mois.

Consultez rogers.com/offresgroupées pour obtenir de plus amples renseignements.

Ne manquez pas cette occasion.
Composez le 1-800-971-7633 ou consultez rogers.com/telephonieresidentielle dès aujourd'hui.



L'offre est en vigueur jusqu'au 31 décembre 2007 et elle s'adresse aux nouveaux clients dans les régions desservies. L'offre ne peut être combinée avec aucune autre réduction. Les tarifs mensuels courants s'appliquent après la période promotionnelle. L'offre peut faire l'objet de changements sans préavis. Certaines restrictions et conditions s'appliquent. Des frais mensuels d'accès au système de 4,50 \$ (frais non gouvernementaux) et des frais de service mensuels s'appliquent. Les taxes, les frais mensuel d'accès au service d'urgence 9-1-1, les frais mensuels pour l'assistance aux personnes malentendantes et les frais mensuels récurrents sur certains forfaits d'interurbain sont en sus. Le crédit de 120 \$ (110 \$ par mois) pendant un an est offert uniquement aux clients qui s'abonnent au service Téléphonie résidentielle de Rogers et à un forfait d'interurbain. Des frais de résiliation anticipée de 120 \$ s'appliquent pour les clients qui annulent leur service la première année. Certains frais d'interurbain ne seront facturés aux clients abonnés à la téléphonie résidentielle de Rogers et à un forfait d'interurbain dont le compte est en règle et dont le service est facturé en vertu du système de facturation, tel qu'identifié par Rogers, et qui appellent d'autres usagers de la Téléphonie résidentielle de Rogers, de Rogers Sans fil et de Fido au Canada. Les appels standard facturés à la minute, les frais liés à d'autres forfaits sans fil et les taxes sont exclus. La réduction liée aux offres groupées Excellent choix^{MC} s'applique uniquement après la période promotionnelle et s'applique aux frais de service mensuels récurrents admissibles, un abonnement de deux ans est requis. Des frais d'installation, de branchement (tel) ou de rebranchement sont en sus. Des frais de revocation s'appliquent et d'autres conditions s'appliquent. Consultez rogers.com/offresgroupées pour obtenir de plus amples renseignements. * Appels à destination du Canada, du territoire continental des États-Unis et d'Haïti uniquement. Restent aux appels résidentiels, cependant toute taxe imposée directement ou messages vocaux. L'utilisation des fonctions Renvoi d'appel et Conférence à trois à des fins de clavardage, de transmission de données, d'envoi de télécopies, ou encore à des fins commerciales et/ou pour effectuer des appels interurbains est interdite. Le service Téléphonie résidentielle est offert uniquement dans les régions desservies. D'autres restrictions s'appliquent. Fido est une marque déposée de Fido Solutions Inc. ^{MC} Marques de commerce de Rogers Communications inc. de Télécommunications Rogers Câble inc. ou de Rogers Sans fil S.E.P.T. Utilisés sous licence. Les autres marques, noms et logos sont des marques de commerce de leurs titulaires respectifs, tous droits réservés. © 2007

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