**BEFORE THE CANADIAN RADIO-TELEVISION AND**

**TELECOMMUNICATIONS COMMISSION**


**TELUS COMMUNICATIONS INC.**

**Telecom Notice of Consultation CRTC 2018-422**

**Proceeding to establish a mandatory code for Internet services**

# Final Submissions of TELUS

**April 23, 2019**

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## 1. Executive Summary

1. In Canada, competition between Internet service providers produces excellent outcomes for Canadians in terms of affordability, availability, and capital investment.[1] As a result, the rationale for regulatory intervention is very weak. Where the Commission decides to regulate, it must be mindful of the character and extent of that intervention.

2. The Internet is the innovation platform for a large and growing part of the Canadian economy, yet Canada's rules governing the Internet increasingly risk rendering it an outlier in terms of scope and granularity of restrictions. These restrictions (set out in a variety of regulatory instruments including the *Wireless Code*, the differential pricing rules and now the proposed Internet Code) exhibit the fundamental attributes of monopoly-era tariffing (detailed, *ex ante* prescription of terms, conditions and rates) notwithstanding that Internet access is a competitively-provided, highly dynamic and rapidly evolving service. Canada is charting a different path from Internet economy leaders, like the United States, where lighter touch regulation has been designed to support innovation and investment in network platforms and the broader economy. It is doubtful, in the extreme, that monopoly-influenced prescriptive regulation will be a path that will lead Canada to the innovation outcomes of the United States and other leading peer jurisdictions.

3. The Commission should now reject disproportionate regulation in favour of greater reliance on competition, which will allow the business flexibility necessary to foster innovation. Where the need to intervene remains, the Commission should restrict action to the minimum set of rules necessary to remedy specific practices that are causing consumer harm. Many of the perceived problems that the Internet Code seeks to remedy have already been addressed by competition between providers. This competition has already reduced or eliminated the need for regulatory intervention.

4. To avoid distorting this competition and protect all consumers, any Internet Code should apply to all providers equally. There is no valid reason to deny the benefits of an Internet Code customers solely on the basis of the ISP they choose. If the Commission determines

[1] See Intervention of TELUS, paras 8-10.

that regulatory protections are required, those protections should be accessible to all Canadians.

5. The Internet Code should also not apply to small businesses services. Internet access services for small businesses are frequently customized with special equipment and installations that have high upfront costs. A requirement to cap early cancellation fees or limit commitment duration may lead to more of those upfront costs being charged to customers. Most importantly, there is little evidence that small businesses require this protection, as complaints to CCTS from small businesses about Internet services account for only 1.4% of total CCTS complaints in 2017-2018.

6. There have been several proposals made in this proceeding that would have the effect of taking away an ISP's pricing flexibility during a commitment term. This could lead to higher monthly prices and less valuable incentives for customers who enter into those term commitments, as ISPs will not able to respond to rapid changes in the industry. Competition has already provided for rate certainty for customers that seek it. Fixed price offers are available today because of competition, not regulation, and the Commission should continue to let competition deliver the outcomes sought by Canadians.

7. The caps on early cancellation fees proposed in the draft Internet Code may also lead to higher prices and less valuable discounts and inducements for consumers. The Commission's proposed cap of $50 on early cancellation fees is likely to result in ISPs being reluctant to offer inducements or discounts that are worth more than $50. Today, TELUS offers discounts and gifts with purchase that are worth many times that amount, which are good for consumers and a point of competitive differentiation for ISPs. With an early cancellation fee cap of $50, TELUS may be unable to continue offering such incentives.

8. It is also critical that regulation support investments in customer-friendly initiatives. TELUS has spent many months and millions of dollars developing a pre-sale quoting system. Some other ISPs are taking or have taken similar steps. These developments are the result not of regulation, but of competition at work: they are demanded by customers. Competition has already provided a solution to the problem that the Commission now seeks

to address by regulation. A different pre-sale quotation requirement could lead to millions of dollars in stranded investments. At minimum, the Commission should wait to see the results of these new systems before it determines that a separate pre-sale quoting system is necessary.

9. Lastly, the Commission should state that the new Internet Code will be the sole and exclusive governing standard for protection of Internet service customers. A century of constitutional jurisprudence is unequivocal that telecommunications regulation lies within the exclusive jurisdiction of Parliament. Most recently, a decision of the Cour du Québec recognized this case law and declared parts of the Quebec *Consumer Protection Act* unconstitutional insofar as they apply to telecommunications services. In addition to the constitutional imperative to do so, confirming that the Code is the sole and exclusive governing standard will ensure consistent protections for customers everywhere in Canada.

## 2. Internet Code should apply to all Internet service providers

10. The Internet Code should apply to all ISPs. To the extent that the measures set out in the Code are justified, all customers are deserving of equal protection, regardless of the ISP from which they choose to receive services. The Commission elsewhere agrees that all customers are deserving of protection, and noted in its submission to the Legislative Review Panel that "[r]esellers are a growing part of the Canadian telecommunications market, and their customers expect to receive the same levels of service and protection (e.g., public safety, net neutrality) as customers of Canadian carriers."[2]

11. Arguments from smaller and reseller ISPs to exempt themselves from the Internet Code are self-serving and mischaracterize evidence. For example, CNOC states that "the vast majority of complaints to the Commission for Complaints for Telecom-television Services ("CCTS") are not caused by smaller providers" and goes on to say that "[s]maller providers are by necessity more responsive to consumer needs."[3] CNOC then concludes that applying

[2] CRTC written public submission to the Legislative Review Panel, 10 Jan 2019, p. 7.
[3] Intervention of CNOC, para. 4.

the Code to smaller ISPs "would not translate into a meaningful contribution towards relieving the leading causes of consumer complaints."[4]

12. These statements are directly contradicted by the fact that smaller ISPs, including members of CNOC, account for a disproportionate number of CCTS complaints. The Commission's own data show that small ISPs accounted for 27% of complaints in 2016-2017 while serving 13% of the customers.[5] CCTS' Intervention also shows that small reseller ISPs including TekSavvy, Primus, Comwave and Distributel are among the top 20 ISPs complained about to the CCTS. Comwave alone accounts for more overall Internet issues than Shaw, Cogeco and Eastlink despite serving significantly fewer customers.[6] There is also evidence of disproportionate increases in the number of complaints regarding smaller ISPs. For example, TekSavvy saw its CCTS complaint numbers regarding service delivery increase by 293% in the 2017-2018 CCTS reporting year when compared with 2016-2017.[7] CCTS' latest mid-year report shows that in six months, TekSavvy had 65 complaints in six months,[8] which (when annualized) is a further increase in total complaints from 2017-2018. CNOC's claim that 75% of TekSavvy's CCTS complaints relate to third parties[9] is not an answer because from the perspective of the end consumer, it does not matter who the issues that resulted in a complaint "relate" to. All ISPs should be responsible to their own customers. CNOC's self-interested attempt to deflect this responsibility is not a reason to exempt its members from the Internet Code.

13. In response to CNOC and other smaller ISPs' arguments about the regulatory burden of the Code,[10] it is no excuse to say that certain providers are too small to comply with consumer protection regulation that they themselves concede to be necessary.[11] If the Code creates unique barriers such that an ISP that would require greater time for implementation, the Commission can consider an extension in a Part 1 application. However, if an ISP is

4 *Ibid*, para. 5.
5 TNC 2018-422, para. 14.
6 Intervention of CCTS, p. 11-12.
7 CCTS 2017-2018 Annual Report, p. 17.
8 CCTS Mid-Year Report, August 1, 2018 – January 31, 2019.
9 Reply of CNOC, paras. 19-22.
10 See, for example, Intervention of CNOC, para. 21 and Intervention of TekSavvy, paras. 5-8.
11 Intervention of CNOC, para. 9.

simply incapable of providing its customers with the minimum level of service deemed acceptable by the Commission, then that ISP should not be serving customers at all.

14. CNOC's Reply submissions attempt to address this issue by pointing to issues that CNOC perceives to be impacting the business of its members.[12] These issues are not an excuse for failing to protect customers. In fact, facilities-based ISPs assume far more business risk than CNOC's reseller membership because facilities based ISPs spend billions of dollars to deploy telecommunications infrastructure in an increasingly competitive environment with no guarantee of sufficient returns. In any event, CNOC has not actually set out any evidence pointing to hardship that would result if its members had to comply with the Internet Code.

15. As noted by the CCTS and others, applying the Code to some ISPs but not others will create two tiers of customers and will cause consumer confusion and administrative difficulty.[13] As the CCTS states in its responses to requests for information: "the same rules, for all types of service, from all communications service providers, for all customers regardless of home province, would be easier for all parties to understand, and for CCTS to administer."[14] Applying the Code to all ISPs will ensure that all customers are protected, all service providers compete on the same basis and the CCTS does not have to apply different standards to different providers while explaining that differentiation to aggrieved and confused consumers.

16. Finally, inconsistent application of the Code would violate the Policy Direction, which requires the Commission to use measures that are implemented in a symmetrical and competitively neutral manner.[15] Applying the Internet Code to some but not all ISPs is not symmetrical and not competitively neutral. The current proposal by the Commission would

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12 Reply of CNOC, paras. 32-35.
13 Intervention of CCTS, para. 60.
14 CCTS(CRTC)4Mar19, A1-2.
15 *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, SOR/2006-355, s. 1(b)(iii), (the "Policy Direction").

give a potential competitive advantage to ISPs that already do not invest in building their own networks, and now will not be required to invest in protecting their customers.

### 3. Applying the Internet Code to small businesses will cause more harm than good

17. As TELUS explained in its Intervention and Reply,[16] the Internet Code should not apply to small business customers. This view is echoed by most ISPs[17] because the cost, complexity, configuration and deployment of Internet solutions for small business customers differs greatly from deployment for those generally sold to consumers. Unlike wireless services, Internet services for businesses can require specialized installation and equipment, customized offers and contracts. Certain Internet Code requirements are therefore impractical when applied to small businesses. [18] Applying the Internet Code only to consumer sales and service would also be consistent with the *Television Service Provider Code*.[19]

18. While the CCTS states that small businesses had a higher proportion of Internet-related issues compared to consumers (34% versus 29%),[20] these numbers are misleading without additional context. Small business complaints comprise only 3.7% of all concluded complaints,[21] and small business Internet issues constituted only 1.4% of all issues raised with the CCTS in 2017-2018.[22] The number of small business complaints related to Internet service is also decreasing year over year.[23] Since small business complaints represent only

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16 Intervention of TELUS, paras 21-23 and Reply of TELUS, paras. 15-17.

17 Many other interveners also did not support the Internet Code applying to small business customers. See Interventions of Bell, paras 13-16; Cogeco, paras 96-98; Eastlink, para 52; Québecor Média, paras 27-38; Shaw, para 10; Rogers, paras 9 and 42-44.

18 See response to request for information TELUS(CRTC)4March19-A1-2.

19 Broadcasting Regulatory Policy CRTC 2016-1, *The Television Service Provider Code*, 7 January 2016 ("BRP 2016-1") (the "TV Code").

20 CCTS(CRTC)4Mar19-A1-2. Figures are from the 2017-2018 CCTS Annual Report, pp. 45 and 15 respectively.

21 CCTS 2017-2018 Annual Report, p 45.

22 A complaint can contain more than one issue. See "Summary of leading complaint issues" data file on the CCTS website at https://www.ccts-cprst.ca/report/annual-report-2017-2018/. By filtering the issues by (i) Internet access service line of business and (ii) small business complainants, the spreadsheet shows a total of 427 complaint issues from small businesses that were related to Internet. This is out of a total of 8,987 Internet issues (or 4.8%) and 30,374 total issues raised (or 1.39%) (see 2017-2018 CCTS Annual Report, p8 for total number of issues).

23 See Intervention of TELUS, para 21 and footnote 21.

a small proportion of overall complaints, and are *decreasing in volume* without regulatory intervention, there is no justification for Commission regulation. This disproportionate approach is also inconsistent with section 1(a)(ii) of the Policy Direction.[24]

19. Finally, while the Internet Code should not apply to small businesses, this does not mean that small business customers would be excluded from the purview of the CCTS when it comes to Internet services. Small business customers would still be able to submit complaints about Internet services and get redress from the CCTS, just as they do today in the absence of an Internet Code.

## 4. The Internet Code should maintain pricing flexibility

20. If price is made a key term of a contract, then the practical result will be that prices will need to be frozen for the life of a customer contract. A requirement to freeze prices for the length of a commitment term could lead to higher prices and/or reduced incentives for consumers who opt for term contracts. Most ISPs that intervened agreed that pricing flexibility should be retained for customers on term contracts.[25]

21. Competition among providers has already resulted in rate certainty for consumers who seek it. While TELUS offers incentives such as gifts and discounts in exchange for a term contract, other ISPs such as Shaw and Eastlink offer guaranteed rates for the duration of the contract. This is a point of competitive differentiation. Mandating that every provider guarantee rates during the life of a contract would regulate away the benefits of competition and take away a customer's choice between, for example, a gift and a guaranteed price.

22. In practice, this means that monthly price should not be a key term of the contract. Even the CCTS does not support making price a key term, and instead proposes that ISPs disclose the circumstances under which the price and service may change.[26] TELUS supports CCTS' proposal. TELUS disagrees with the so-called "middle-ground" proposed by CNOC.[27] That proposal consists of a notice of change in price and termination of the

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24 Policy Direction, s. 1(a)(ii).
25 See, for example, Intervention of CNOC, para. 17.
26 CCTS(CRTC)04March19-A1-1.
27 CNOC(CRTC)04March19-A1-1.

term agreement if a customer disagrees with the change. That does not work where an ISP gave incentives worth hundreds of dollars or more to a customer in exchange for a term commitment. Under CNOC's proposal, the customer would not accept a price increase when he or she can refuse the price increase and either (1) force the ISP to provide services at the old price; or (2) force the ISP to terminate the contract, and keep any gift received. Under this regulatory framework, there would be no reason for ISPs to provide incentives to enter into term contracts.

## 5. Cap on early cancellation fees must account for inducements and ISPs' costs

23. TELUS argued in its Intervention and Reply that the Commission should not adopt a proposal to impose a hard cap on early cancellation fees.[28] Most ISPs participating in this proceeding agree that capping early cancellation fees to $50 will lead to negative consumer outcomes.[29]

24. The proposed language of the Internet Code with respect to early cancellation fees makes no provision for the fact that ISPs often bear costs far in excess of $50 when signing up new customers. Many customers receive gifts with purchase worth hundreds of dollars. ISPs also bear the costs of installation (including dispatching a technician) and often provide discounted or free equipment rental. Some ISPs provide guaranteed prices for the term of the contract in exchange for a commitment by a customer to take services for that term.[30]

25. Early cancellation fees charged by ISPs are not punitive; they are intended to be a partial recovery of amounts actually expended by ISPs on installation, gifts with purchase and price guarantees. Putting a cap on that cost recovery risks removing the incentive for ISPs to offer those incentives, ultimately leading to higher costs for consumers.

26. It would be problematic to have the language of the Internet Code mirror the language of *Wireless Code* for term commitments where a customer does not receive a subsidized

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28 Intervention of TELUS, paras. 30-37 and Reply of TELUS, paras. 18-22.

29 Eastlink, Distributel, Xplornet, Bell, Cogeco, Shaw, TELUS, Vidéotron, SaskTel, Rogers and CNOC all provided reasons for which this proposal should not be implemented.

30 See, for example, Intervention of Eastlink, para. 48.

device. In the wireless context, service providers do not have to bear the cost of a physical installation of service and may simply stop offering gifts with purchase and other optional incentives if they are not able to recover their cost in the event of early cancellation by a customer. It is not open for ISPs to stop offering installations: a technician is required to check compatibility and, if needed, install a physical cable. This is an unavoidable cost for many ISPs. A hard cap on early cancellation fees may lead to consumers paying higher installation costs than they do today, which would be a barrier for some people to obtaining Internet access. For these reasons, a hard cap on early cancellation fees should be rejected and any cap should take into account the value of incentives received by the customer.

## 6. A mandatory pre-sale CIS is unnecessary and will lead to stranded investments

27. Many ISPs, including Rogers, Vidéotron, Bell, TekSavvy and TELUS are either developing or have already deployed pre-sale quoting systems to provide customers with detailed information and facilitate customers' decision making and comparison shopping. Mandating a pre-sale CIS, as Option #2 of section A.5 of the draft Internet Code contemplates, would strand the investments made by these ISPs to develop quoting systems. It would also disincentivize ISPs from developing future marketing and sales solutions to differentiate themselves out of fear that the Commission may mandate something different and investments in those solutions would become stranded.

28. The Commission has also, on two occasions, considered mandating a pre-sale CIS as part of the *Wireless Code*, and twice has found that the resulting financial and resource burden was not justified.[31] There is no evidence in this proceeding on which a different conclusion can be reached, particularly in light of the fact that many providers are working to implement pre-sale quoting systems in the absence of a regulatory requirement to do so.

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31 "The proposal to require WSPs to provide the Summary before a contract has been entered into would involve a significant burden, from both a financial and a resource perspective, and the Commission considers that it is not necessary to require this." Telecom Regulatory Policy CRTC 2013-271, *The Wireless Code*, 3 June 2013, para 71. "The Commission considers that parties in this proceeding have not provided evidence that circumstances have changed sufficiently since the Code came into effect such that the benefit of providing consumers with a CIS during the pre-purchasing stage would outweigh the burden on WSPs." Telecom Regulatory Policy CRTC 2017-200, *Review of the Wireless Code*, 15 June 2017 at para 188.

29. Instead, the Commission should wait to see the effect of the ISP's quoting systems presently under development. This is compliant with the Policy Direction and is consistent with Option #1 of section A.5 of the draft Internet Code, which would require ISPs to ensure that offers made to customers are clearly explained.[32] Option #1 is also consistent with the requirements contained in the *Television Service Provider Code*. Consistency in the sales process of TV and Internet services would minimize customer confusion and administrative burden.

30. Finally, ISPs should not be required to keep offers open for a prescribed period of time.[33] Such a requirement could provide information about promotional strategies to competitors, inhibit ISPs' ability to respond to changing competitive conditions and make it difficult to manage inventory of promotional items such as televisions, gift cards and laptops.

## 7. The Commission should state that the Code is binding and exclusive throughout Canada

31. In its Intervention, TELUS requested that the Commission clearly state that the new Internet Code will be the sole governing standard for protection of Internet service customers, leaving no room for provincial encroachment. This statement is necessary to ensure that consumer protections are consistent between provinces, that duplicative and potentially contradictory regimes do not threaten the national application of federal rules, and that the Commission's intentions are not thwarted by provincial regulators who may desire to implement a different regulatory regime. Most importantly, this statement is consistent with Canada's constitutional law, which grants the exclusive power to regulate telecommunications to the Federal government.

32. As TELUS stated in its answers to requests for information, provincial legislation that regulates the offer and provision of telecommunications services is unconstitutional

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32 Many interveners agree that Option #1 is the preferred option. See Intervention of Eastlink, paras 22-28; Intervention of Xplornet, paras 30-34; Intervention of CNOC, p. 13; Intervention of Cogeco, paras 22-26 and 33; Intervention of Shaw, paras 46-58; Intervention of Vidéotron, paras 39-50; Intervention of SaskTel, para 29-33; Intervention of Rogers, paras 14 and 19-20; and Intervention of Bell, paras 19-22

33 See Intervention of TELUS, paras. 46-49.

regardless of whether it conflicts with federal legislation or regulation.[34] Section 92(10)(a) of the *Constitution Act, 1867* grants Parliament exclusive jurisdiction over telecommunications including the location, construction, and maintenance of the telecommunication networks and equipment, as well as telecommunication service providers' rates and services,[35] including the relationships between the ISPs and customers.

33. Even where a provincial law is validly enacted—for example, under provincial jurisdiction over property and civil rights—to the extent it regulates the offer and provision of telecommunications services, it will ordinarily be constitutionally inapplicable by virtue of the doctrine of interjurisdictional immunity. This doctrine prevents valid laws enacted by one level of government from impairing the "unassailable core" of the other level of government's exclusive jurisdiction. It is the scope of the jurisdiction that must be considered in the context of this analysis[36] and it is irrelevant whether or not an ISP can simultaneously comply with both the federal and provincial enactments. Section 92(10) establishes classes of federal undertakings to which a basic, minimum and unassailable content[37] must be assigned and protected from provincial encroachment, independently of questions of conflict (i.e. under the operational conflict branch of the doctrine of paramountcy).

34. Furthermore, provincial regulation of the offer and provision of telecommunications services will generally frustrate the purpose of the *Telecommunications Act* and the broader telecommunications regulatory framework and, as a result, will be inoperative by virtue of the doctrine of paramountcy.[38]

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34 See TELUS(CRTC)4Mar19-A1-3 for a complete discussion of Constitutional matters at issue in this proceeding.

35 Michael Ryan, "Telecommunications and the Constitution: Re-Setting the Bounds of Federal Authority" (2010), 89 Can. Bar. Rev. 695, p. 726. See also *Canadian Western Bank v. Alberta*, [2007] 2 SCR 3, para. 57; *Bell Canada v. Québec (C.S.S.T.)*, [1988] 1 SCR 749 9 ("*Bell 1988*"); *Commission du Salaire Minimum v. Bell Telephone Company of Canada*, [1966] SCR 767; H. Brun, G. Tremblay and E. Brouillet, Droit constitutionnel, 6th Ed., Yvon Blais, Cowansville, 2014, at 562.

36 *Québec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] 2 SCR 536 ("COPA"), paras. 27, 48, 62. See also *Canadian Western Bank v. Alberta*, [2007] 2 SCR 3.

37 *Bell 1988* at para. 254.

38 See TELUS(CRTC)4Mar19-A1-3, paras. 28-40 for a detailed explanation.

35. Some parties, including the Government of Quebec, dispute this analysis. However, the case law underpinning this analysis extends over more than a century and has been confirmed, yet again, in a ruling from the Cour du Québec. In *Directeur des poursuites criminelles et pénales c. TELUS Communications Inc.*, the Court ruled that prosecutions of TELUS under certain sections the Quebec *Consumer Protection Act*[39] were unconstitutional by virtue of the doctrines of interjurisdictional immunity and paramountcy.[40]

36. The provincial legislative provisions declared unconstitutional govern, among other things:

a. The unilateral amendment of contracts;[41]

b. Notification requirements for the cancellation of indeterminate contracts;[42]

c. Key terms that must be disclosed in sequential performance contracts provided at a distance, including, among other things, the monthly rate for services, the value of any economic inducements, and the total amount a consumer must pay monthly under a contract;[43] and

d. Fees charged upon cancellation of fixed-term contracts.[44]

37. Prior to ruling on interjurisdictional immunity and paramountcy, the Court found that Parliament has set out a complete and national regulatory framework, including with respect to rates and conditions of service:

> [L]es parlementaires fédéraux ont choisi d'occuper ce champ de compétence en promulguant un régime réglementaire **complet et national** qui tient compte des spécificités d'une industrie en constante évolution, qui reconnait le caractère essentiel des télécommunications pour les canadiennes et canadiens, et qui définit les objectifs de la politique canadienne sur les télécommunications.

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39 *Consumer Protection Act*, C.Q.L.R. c. P-40.1. ("QC CPA")

40 *Directeur des poursuites criminelles et pénales c. TELUS Communications Inc.*, 2019 QCCQ 2143 ("*TELUS v. DPCP*")

41 QC CPA, s.11.2.

42 QC CPA, s.11.3.

43 QC CPA, s.214.2

44 QC CPA, s.214.7.

> […]
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> Ce champ de compétence est pleinement et **entièrement occupé par le fédéral** qui en régit tous les aspects allant de l'émission de licences et de permis d'exploitation à l'emplacement des tours de télécommunications, en passant par la prestation, **la tarification et les conditions de commercialisation des services**.[45] [Emphasis added.]

38. In ruling on interjurisdictional immunity, the Court found that setting conditions of service is a fundamental exercise of the federal power over telecommunications, essential to, and inseparable from, the responsibility of Parliament to ensure the attainment of the Canadian telecommunications policy objectives set out in the *Telecommunications Act*:

> La détermination des conditions de commercialisation des services de télécommunications est un aspect crucial et fondamental de l'exercice de la compétence fédérale. Aux yeux du Tribunal, elle fait partie de son contenu essentiel et est indissociable de la responsabilité du gouvernement fédéral d'assurer le développement ordonné et l'exploitation efficace des télécommunications en fonction des objectifs de la politique canadienne de télécommunications.[46]

39. In ruling on paramountcy, the Court similarly found as follows, on the basis that the Quebec legislation frustrated the purpose of the *Telecommunications Act*, rather than on the basis of any operational conflict:[47]

> En l'espèce, le Tribunal a longuement traité des caractéristiques uniques et distinctives qui sont à la base de la législation fédérale et des objectifs de la politique nationale en matière de télécommunications. Selon ce régime, **les pouvoirs de réglementer les tarifs, la prestation des services et les conditions de commercialisation sont spécifiquement et exclusivement attribués au CRTC**. Et cette compétence est explicitement assujettie à un pouvoir et devoir d'abstention.
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> Dans ce contexte, il est clair que les dispositions de la L.p.c. ont pour effet de régir les conditions de commercialisation des télécommunications sans égard à la volonté explicite du Parlement

45 *TELUS v. DPCP* at paras. 125 and 127.
46 *TELUS v. DPCP* at para. 141.
47 *TELUS v. DPCP* at para. 150.

> de limiter la réglementation aux seuls cas où cela est nécessaire et sans tenir compte des facteurs, exigences et contingences que le Parlement impose à l'organisme spécialisé chargé de cette responsabilité.[48] [Emphasis added.]

40. This decision could not be clearer. The regulation of telecommunications services, including conditions of service, is exclusively federal, and thus the jurisdiction of the Commission, acting under the *Telecommunications Act*. Provincial consumer protection legislation will be unconstitutional where applied to regulate the offer and provision of telecommunications services by virtue of the fact that it trenches on the core of federal jurisdiction (interjurisdictional immunity) and frustrates the purpose of the *Telecommunications Act* (paramountcy).

## 8. Conclusion

41. In peer jurisdictions across the world, regulators have recognized the need for innovation and investment, and accordingly are seeking to engage in targeted regulation, rather than a return to heavy-handed codes tantamount to monopoly-era regulation. In proposing an Internet Code, the Commission must be careful not to regulate away competition and innovation, and thus the potential for growth in the digital economy. To the extent the Commission determines that additional rules are necessary, it should ensure that the Internet Code is applied in a competitively neutral manner and that all residential high-speed Internet subscribers in Canada have the benefit of the Code, regardless of their choice of ISP.

42. There is also no evidence demonstrating a need to apply the Internet Code to small business customers. In fact, in the absence of a Code, complaints from small businesses about internet services are a tiny percentage of all complaints and the number of complaints is falling. There is also evidence that application of the Code may cause significant damage in the form of higher prices for installation, fewer incentives and customization options and/or higher subscription prices. The proposal to apply the Code to small businesses should be rejected.

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48 *TELUS v. DPCP* at paras. 151-152.

43. In order to ensure strong performance and competition in the sale of Internet access, the Commission should allow ISPs to maintain price flexibility during the commitment term. Compelling ISPs to, in effect, guarantee a price by making it a key term of the contract will regulate away a competitive differentiator between ISPs and may lead to lower-value incentives for customers. Instead of a mandatory price guarantee, TELUS supports CCTS' proposal requiring ISPs to disclose the circumstances under which the price and service may change. This way, customers would be clearly informed that their prices are not guaranteed and will know the circumstances in which they can change.

44. TELUS also opposes any requirement to provide a pre-sale critical information summary. For reasons described in TELUS' Intervention and Reply, this is not friendly to customers (potentially requiring ISPs to provide multiple documents and causing confusion) and will destroy millions of dollars of investments made by TELUS in customer-friendly quoting systems. The precedent that would be set by compelling ISPs to decommission or significantly modify these systems may chill future investment in customer-friendly initiatives. Competition has already provided a solution to the problem that the Commission aims to resolve and there is thus no need for regulatory intervention.

45. Lastly, given the issues raised by TELUS, Government of Québec and other interveners regarding the Constitutional status of the Code relative to provincial enactments, the Commission needs to make a clear statement that that the new Internet Code will be the will be the sole governing standard for protection of Internet service customers, exclusively federal and will leave no room for provincial encroachment. Such a statement is consistent with nearly a century of constitutional jurisprudence from all levels of Canadian courts and would ensure a consistent set of rules throughout Canada. Parliament has entrusted the Commission with exclusive authority over telecommunications and the Commission must nurture and protect that authority. It cannot protect this exclusive authority if it invites or condones unconstitutional provincial participation in telecommunications regulation.

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