



**Canadian Internet Policy and Public Interest Clinic  
Clinique d'intérêt public et de politique d'internet du Canada**

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Ministry of Consumer and Business Services  
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BY FAX AND EMAIL

Dear Sir/Madam:

Re: Draft Regulations under Consumer Protection Act, 2002

The following comments are provided by the Canadian Internet Policy and Public Interest Clinic (CIPPIC), in response to the public consultation on the above-mentioned draft regulations.

CIPPIC was established in fall of 2003 at the University of Ottawa, Faculty of Law, Common Law Section. The clinic seeks to ensure balance in policy and law-making processes on issues that arise as a result of new technologies. Upper year law students work under the supervision of the Clinic director on projects and cases involving the intersection of law, technology and the public interest.

CIPPIC's comments focus on issues arising in the online context. Specifically, we have reviewed and provide comments on the following topics:

- Information disclosure requirements for online consumer contracts
- Amendment, Renewal and Extension of Consumer Agreements and Material Changes in Goods and Services provided under Consumer Agreements
- Public Records and Enforcement
- Procedures for Consumer Remedies
- Overlap.

General Comments

CIPPIC commends the Government of Ontario on these proposed regulations. The proposals address a number of serious problems experienced by consumers in the online marketplace and would better ensure that consumers have the information and tools they need to transact with confidence.

With the growth of electronic commerce and the use of new technologies by both businesses and consumers have come new problems and challenges. The *Consumer*

*Protection Act, 2002* and the draft regulations to which these comments are addressed constitute a well-considered, appropriate and fair approach in the new environment. CIPPIC submits that the proposed regulations are generally fair to both businesses and consumers, and workable in practice. We propose a few relatively minor revisions in order to improve clarity and effectiveness.

#### “In writing” requirement

The Ministry notes that it is considering a rule that, if the *Consumer Protection Act, 2002* (“CPA2002”) requires that something be “in writing”, only those electronic records that are visible and in text form be accepted as substitutes for paper records.

CIPPIC supports this approach. The point of an “in writing” requirement under the CPA2002 (e.g., ss.22, 27, 39, 46) is not only to ensure that consumers can access and retain the information (as required under the *Electronic Commerce Act, 2000*), but also to ensure that they can read the information without difficulty. Information provided in a non-visible or non-text electronic form may be difficult or impossible for some online consumers to read.

In some cases, however, the consumer may want to receive the information in hard copy, not electronically. This could be the case, for example, with large documents or where the consumer has difficulty dealing with electronic documents. **If mandatory “in writing” disclosures under the Act are not required to be delivered in hard copy, consumers should be entitled to hard copies of such information upon request.**

#### Draft Regulation on Internet Agreements

##### *Mandatory Disclosures*

CIPPIC strongly supports the mandatory disclosure requirements set out in this draft regulation. All of the listed information items are essential in order for consumers to make an informed purchase online. The sum of required disclosures is not onerous for businesses; rather, it makes common sense and should be current practice in any case. CIPPIC notes that these mandatory disclosures are based on the *Internet Sales Contract Harmonization Template*, which Ontario and other provinces agreed to over two and a half years ago, after a public consultation process. Moreover, they are consistent with the *Canadian Code of Practice for Consumer Protection in Electronic Commerce*, a set of standards developed by businesses, consumer groups and governments.

It should also be noted that the mandatory disclosures set out in this draft regulation are limited to important transaction-related information. Best practices for online businesses, as set out in the above-mentioned Code of Practice, require additional disclosures such as information on applicable guarantees and warranties, the business’s privacy policy, and any seal or other self-regulatory programs in which the vendor participates. In other words, the proposed regulation sets baseline standards for all online vendors, while

leaving significant room for businesses to promote themselves as consumer-friendly through voluntary practices and industry self-regulation.

#### *Delivery of Internet Agreement*

CIPPIC supports the proposed section regarding delivery of the Internet agreement. In no event should the maximum time period for delivery of the Internet Agreement exceed 15 days.

#### *Threshold for application of application of consumer protections in this regulation*

The government proposes to apply the above regulations (and those related to Future Performance Agreements and Remote Agreements) only if “the consumer’s total potential payment obligation under the agreement, excluding the cost of borrowing, exceeds [\$50]”.

First, it is not clear whether shipping/delivery charges, taxes, and other surcharges are included in the concept of “total potential payment obligation”. This should be clarified in the regulation.

Second, while established in other legislation, \$50 is high threshold, especially for one-time purchases of goods such as books. Many Internet (and other remote) transactions involve a total payment obligation of less than this amount. It is not clear why lower priced transactions should not benefit from the same protections regarding information disclosure. CIPPIC suggests that a \$25 threshold may be more appropriate.

CIPPIC notes that by applying any monetary threshold at all, the Act and Regulations fail to provide protection to consumers engaging in transactions involving non-monetary exchanges (such as providing personal information in exchange for a service). To the extent that such non-monetary transactions become more common, consideration should be given to ways in which they can also be covered.

#### Amendment, Renewal and Extension of Consumer Agreements and Material Changes in Goods and Services

One of the most troubling developments in e-commerce in recent years has been the growing practice of automatic contract amendments without the consumer’s knowledge or consent. The online context provides businesses with unparalleled opportunities to post detailed standard terms of service and other contract provisions on a website and to make changes at will, without obtaining the customer’s consent to such changes, let alone individually notifying affected customers. As a result, consumers are often surprised to find that their monthly service bill has increased, that the service they had originally contracted for has been scaled back, or that some other important element of the original agreement has been changed without their knowledge or consent.

Some consumer agreements stipulate that the service provider may modify the agreement at any time without the consumer's consent, merely by posting a notice of the modified agreement on the provider's website. For example, Bell Sympatico's High Speed Internet service agreement (updated Nov.30, 2003) states as follows:

Your Service Provider may modify this Service Agreement at any time without your consent or authorization, including modification of prices, or modification or termination of the Service, or any components thereof. Your Service Provider will notify you of any changes to this Service Agreement by posting notice of the modified Service Agreement at [www.agreements.sympatico.ca](http://www.agreements.sympatico.ca), or by sending you notice via e-mail to your parent Sympatico address. You agree to go to [www.agreements.sympatico.ca](http://www.agreements.sympatico.ca) periodically and to review this Service Agreement to be aware of such modifications and your continued use of the Service shall be deemed to be your acceptance of the modified Service Agreement. If you do not agree to any modification of this Service Agreement, you must immediately cancel Service.

A similar service agreement formed the basis of a dispute between a Rogers High Speed Internet subscriber and Rogers a few years ago.<sup>1</sup> In that case, the subscriber was unsuccessful in certifying a class action against Rogers, on the grounds that the service agreement barred such actions. However, the clause in question had been added to the subscriber's original service agreement by Rogers without the subscriber's knowledge. The court in that case held that the mere posting of the amended agreement on the Rogers website constituted sufficient notice, and that the subscriber was bound by the amended agreement.

This decision was widely deplored, for good reason. However, it was not appealed, apparently due to a settlement between the parties. Clearly, it is unreasonable to require consumers to check, on a regular basis, the website of every online service provider they contract with and to research each site in order to determine whether their original contract for service has been amended. CIPPIC commends the government of Ontario for its response to this manifestly unfair legal precedent, by way of these proposed regulations. With such an impractical and unfair ruling by an Ontario judge, it was incumbent on the government to legislate clear, fair, and practical rules respecting unilateral contract amendments by service providers.

The proposed regulation regarding unilateral contract amendments establishes common sense rules that reflect the reasonable expectations of consumers. In particular, where the terms of service state that they may be unilaterally amended, the service provider may proceed with such amendments without affirmative consent on the part of the consumer as long as it has properly notified the consumer ("in such as way that [the notice] is likely to come to his or her attention") in advance of the effective date of the amendment (30-90 days), and with full and clear disclosure of the nature of the amendments. Affirmative consent on the part of the consumer is only required where the original agreement was silent as to future amendments.

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<sup>1</sup> *Kanitz v. Rogers Cable Inc.*, 58 O.R.(3d) 299 (Ont.S.C.J.).

These are reasonable standards of business practice. They do not impose an undue burden on businesses, and do not provide consumers with any more protection from unreasonable business practices than is warranted.

*Time period for provision of updated agreement*

Proposed regulation “ren.2(3) requires the supplier to provide “an updated version of the [amended, renewed or extended] agreement to the consumer within 45 days after the consumer and supplier have both agreed to the proposal.” It is not clear why 45 days are required for this purpose, especially in light of the 15 day delivery requirement for contract terms under the proposed regulations regarding Future Performance, Remote and Internet Agreements. CIPPIC submits that **a 15 day delivery requirement would be more reasonable and consistent with other regulations.**

Public Records and Enforcement

CIPPIC strongly supports the proposals to make public, via the Government of Ontario website, information on consumer complaints regarding business practices that may be in contravention of the Act. CIPPIC also supports the proposal to include in such information the identity of the business and the substance and disposition of the complaint.

This is exactly the kind of public interest use to which the Internet can, and should, be put by governments. Information on complaints is highly relevant to consumers; without it, their marketplace decisions are less informed and the benefits of a competitive marketplace are more difficult to achieve. Such information should be available to consumers in an easily accessible manner; the web clearly provides an opportunity to do just that. A single online database through which consumers can check businesses for consumer complaints also has the potential to reduce significantly the incidence of consumer harm due to unfair business practices, as consumers avoid those businesses with a poor record.

While some private sector initiatives (such as the Better Business Bureau) offer consumers a similar service now, they are entirely voluntary and therefore neither comprehensive nor subject to independent oversight. Moreover, they are not designed to monitor or report on alleged violations of consumer protection legislation. Hence, there remains an information void which governments are uniquely situated to fill, in furtherance of greater marketplace transparency, a more informed consumer, and hence a better functioning consumer marketplace.

Businesses may object to being publicly identified on the basis of a mere allegation, rather than a confirmed contravention. However, the proposed database would include the substance and disposition of each complaint, thus distinguishing between those allegations that have merit and those that do not. CIPPIC submits that as long as all businesses are treated equally (i.e., subject to the same level of transparency regarding

complaints about them), then there is no unfairness in the proposal to identify the supplier to whom a complaint relates. Without such identification, an important level of transparency will be lost and the marketplace will suffer.

#### Procedures for Consumer Remedies

CIPPIC also supports the proposed regulation regarding consumer remedies. Once again, the government has struck a fair balance between business and consumer obligations, and is proposing reasonable, common sense procedures for consumer redress when a transaction goes wrong.

With respect to the cancellation or reversal of credit card charges (9.9), CIPPIC suggests one additional clause, **requiring credit card issuers to inform consumers who make a request under subsection 99(1) of the Act of any missing information in their request.** Most consumers will be unaware of the regulation's specific information requirements for credit card chargebacks. Credit card issuers should not be able to deny a consumer request on the grounds that certain information was missing, if the consumer has not been given an opportunity to provide the required information.

#### Overlap

CIPPIC finds the proposed rules regarding overlapping statutory requirements for certain types of consumer agreements to be somewhat confusing. For example, it was not totally clear to us that s.26, the rule regarding cancellation rights in the context of late delivery, applies to Internet and Remote Agreements, as well as to other Future Performance Agreements. While a close reading of the statute and proposed regulation on overlap clarify which rules apply to which types of Agreements, it is unlikely that most ordinary consumers and business persons would have the time and ability to engage in such an exercise. If possible, the statute itself should be clear as to which rules apply to which types of contract; overlap rules should only be left to regulations if absolutely necessary.

#### Conclusion

Once again, we commend the Government of Ontario on this initiative and we look forward to the new consumer protection legislation coming into force and creating a more fair and transparent marketplace in this province.

Yours truly,

*Original signed*

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