



## Telecom Decision CRTC 2008-46

Ottawa, 30 May 2008

### **Applications to review and vary certain determinations in Telecom Decision 2007-130 regarding the establishment of an independent telecommunications consumer agency**

Reference: 8662-B60-200801862 and 8662-B54-200801911

*In this Decision, the Commission varies the following aspects of Telecom Decision 2007-130:*

- *the determination mandating membership in the Commissioner for Complaints for Telecommunications Services Inc. (the Agency) for all qualifying telecommunications service providers, by declaring that this requirement remains in effect for a period of three years from the date of Telecom Decision 2007-130;*
- *the determination announcing the Commission's future review of the Agency, by declaring that the Commission will initiate such a review within three years of Telecom Decision 2007-130 and that its review of the mandatory membership requirement will be conducted on a de novo basis;*
- *the determination regarding contractual limitation of liability clauses, by specifying that binding monetary awards need only relate to direct damages actually sustained; and*
- *the determination regarding collective and representative complaints, by providing that each such complaint accepted for resolution by the Agency should be treated as a single complaint for the purpose of liability.*

*In addition, regarding binding monetary awards, the Commission clarifies that the complainant has the obligation to demonstrate the existence and amount of losses actually incurred.*

### **Introduction**

1. The Commission received two applications, both dated 4 February 2008, seeking to review and vary certain aspects of Telecom Decision 2007-130. In that Decision the Commission approved, subject to certain conditions being met, the structure and mandate of the Commissioner for Complaints for Telecommunications Services Inc. (the Agency), a telecommunications consumer agency established by telecommunications service providers (TSPs). The applications were submitted by Bragg Communications Inc.; Cogeco Cable Inc., Quebecor Media Inc. on behalf of Videotron Ltd., Rogers Communications Inc., and Shaw Communications Inc. (collectively, Bragg et al.), and by Bell Aliant Regional Communications, Limited Partnership, Bell Canada, Northwestel Inc., and Télébec, Limited Partnership (collectively, Bell Aliant et al.).

2. The applications requested that the Commission review and vary its determinations regarding matters associated with limitation of liability. Bragg et al. also requested that the Commission review and vary its determinations related to mandated membership, and collective complaints and complaints made by a consumer organization on behalf of one or more consumers (representative complaints).
3. The Commission received comments and/or reply comments on one or both applications from Bragg et al., Bell Aliant et al., Saskatchewan Telecommunications (SaskTel), Primus Telecommunications Canada Inc. (Primus), the Public Interest Advocacy Centre on behalf of the Consumers' Association of Canada and the National Anti-Poverty Organization (PIAC), and the Canadian Internet Policy and Public Interest Clinic (CIPPIC). The public record of these proceedings, which closed on 17 March, is available on the Commission's website at [www.crtc.gc.ca](http://www.crtc.gc.ca), under "Public Proceedings."

## **Background**

4. On 4 April 2007, the Governor in Council issued *Order requiring the CRTC to report to the Governor in Council on consumer complaints*, P.C. 2007-533 (the Order). In the Order, the Governor in Council stated that an industry-established consumer agency, independent from the telecommunications industry, with a mandate to resolve complaints from individual and small business retail customers (consumers), should be an integral component of a deregulated telecommunications market. The Order also provided that the structure and mandate of the industry-established consumer agency would be approved by the Commission.
5. In Telecom Public Notice 2007-16, the Commission, in response to a proposal filed by certain TSPs, initiated a proceeding and invited comments on, among other matters, the structure and mandate of the proposed Agency. In Telecom Decision 2007-130, the Commission approved the structure and mandate of the Agency, subject to a number of conditions.

## **Issues**

6. The Commission has identified the following three issues to be addressed in its determinations:
  - I. Is there substantial doubt as to the correctness of the Commission's requirement that all TSPs with annual Canadian telecommunications service revenues exceeding \$10 million in the previous fiscal year (qualifying TSPs) are to be members of the Agency?
  - II. Is there substantial doubt as to the correctness of the Commission's determination that in order for the Agency to receive the Commission's approval, all applicable Agency documents are to be amended to ensure that the Agency's chief executive officer (CEO) is, in the case of binding decisions, not to be constrained by contractual limitations of liability?
  - III. Is there substantial doubt as to the correctness of the Commission's request that the Agency report back to the Commission on its review of whether and how collective and representative complaints should be accepted and processed by the Agency?

**I. Is there substantial doubt as to the correctness of the Commission's requirement that all qualifying TSPs are to be members of the Agency?**

7. In Telecom Decision 2007-130, the Commission determined, under section 24 of the *Telecommunications Act* (the Act), that
  - as a condition of providing telecommunications service, all Canadian carriers with annual Canadian telecommunications service revenues exceeding \$10 million in the previous fiscal year, as reported to the Commission under the contribution regime, are required to be members of the Agency; and
  - as a condition of providing telecommunications service to any reseller, all Canadian carriers are required to include in their service contracts and other arrangements with such resellers the stipulation that any such reseller exceeding the threshold noted above is required to be a member of the Agency.
8. Bragg et al. submitted that substantial doubt exists as to the correctness of the Commission's determination that all qualifying TSPs are required to be members of the Agency. CIPPIC and PIAC disagreed with this view, arguing, among other things, that the Commission has the authority to mandate membership by all qualifying TSPs.
9. Bragg et al. argued that the Commission does not have the authority to subdelegate its complaint resolution powers; to award monetary compensation and, therefore, to subdelegate such a power; to require member TSPs to contribute to the funding of the Agency; or to force member TSPs to waive their procedural rights. Bragg et. al. argued that this was, however, the effect of the Commission's decision to mandate membership in the Agency by all qualifying TSPs and, thus, that the Commission has no authority to mandate membership.
10. Bragg et al. also argued that the determination that membership would be mandatory for all qualifying TSPs cannot be reconciled with prior Commission forbearance decisions and the requirements imposed by *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives*, P.C. 2006-1534, 14 December 2006 (the Policy Direction).
11. SaskTel and Primus indicated their support for the above arguments. SaskTel further submitted that given that the Commission does not have the authority to award monetary compensation, it has also exceeded its jurisdiction by directing that the maximum amount of compensation that the Agency can award be raised from \$1,000 to \$5,000 per complaint.
12. The Commission considers that it has the authority to mandate membership in the Agency by all qualifying TSPs. The Commission notes that section 24 of the Act provides the Commission with broad powers to make the provision of telecommunications services by Canadian carriers subject to conditions.<sup>1</sup>

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<sup>1</sup> In the past the Commission has imposed conditions of service on the provision of telecommunications services by Canadian carriers, whether or not such services are forborne.

13. The Commission also notes that in its past forbearance decisions, it maintained its powers under section 24 with respect to services included in the scope of eligible complaints for the Agency.
14. Section 47 of the Act requires the Commission to exercise its powers and perform its duties under the Act, including those under section 24, with a view to implementing the Canadian telecommunications policy objectives set out in section 7 of the Act, as well as in accordance with any orders made by the Governor in Council under section 8 of the Act.
15. The Commission considers that, as noted at paragraph 27 of Telecom Decision 2007-130, the mandatory membership requirement will advance the policy objectives set out in paragraphs 7(b), (f), and (h) of the Act. For the reasons given in Telecom Decision 2007-130, the Commission also considers that mandating membership in the Agency for all qualifying TSPs is consistent with the Policy Direction.
16. The Commission notes that several major TSPs, including Shaw Communications Inc. and Primus, still have not joined the Agency. The Commission considers that mandating membership in the Agency by all qualifying TSPs is meant to ensure the effectiveness of the Agency at this critical juncture as it establishes its operations and consumers start to become aware of its existence and mandate.
17. The Commission considers that once the Agency has operated for a few years, consumers would be aware of the organization and would rely upon it to help resolve their complaints. In such circumstances, the Commission considers that market forces could be relied upon to ensure sufficiently comprehensive membership in the Agency and, therefore, that mandating membership would no longer be necessary to ensure its effectiveness. With these considerations in mind, the Commission determines that the period of mandatory membership should be established for three years, starting from the date Telecom Decision 2007-130 was issued.
18. In Telecom Decision 2007-130, the Commission considered that it would be appropriate to conduct a review of the Agency's structure and mandate, as well as related matters, in the future to examine how effectively the Agency is operating. While Telecom Decision 2007-130 stated that the scope of matters to be reviewed would be determined at a later time, the Commission considers it essential that there be clarity and certainty for all stakeholders with respect to mandatory membership.
19. Accordingly, the Commission will initiate a review of the Agency, including mandatory membership, no later than three years after the issuance of Telecom Decision 2007-130. The review of mandatory membership will be conducted on a *de novo* basis in light of the circumstances prevailing at that time.
20. In light of the above, the Commission varies the beginning of paragraph 31 of Telecom Decision 2007-130 as follows (modifications indicated in bold):

31. The Commission determines, under section 24 of the Act, that **for a period of three years commencing on the date of this Decision,**

...

21. The Commission also varies paragraph 118 of Telecom Decision 2007-130 as follows (modifications indicated in bold):

118. Accordingly, the Commission determines that it will initiate a review of the Agency, **within three years from the date of this Decision, based on the circumstances prevailing at that time. With respect to the mandatory membership requirement, the review will be conducted on a *de novo* basis.**

**II. Is there substantial doubt as to the correctness of the Commission's determination that in order for the Agency to receive the Commission's approval, all applicable Agency documents are to be amended to ensure that the Agency's CEO is, in the case of binding decisions, not to be constrained by contractual limitations of liability?**

22. In Telecom Decision 2007-130, the Commission established, as a condition of its approval, that all applicable Agency documents are to be amended
- such that the Agency's CEO is not, in the case of binding decisions, constrained by contractual limitations of liability; and
  - to give the Agency's CEO the power to award compensation up to \$5,000 per complaint.
23. Bragg et al. and Bell Aliant et al. argued that there was substantial doubt as to the correctness of the Commission's determination with respect to limitations of liability. CIPPIC and PIAC disagreed with this view, arguing, among other things, that the Commission's determination regarding contractual limitations of liability clauses was a valid exercise of its powers under the Act.
24. To support their views regarding substantial doubt, Bragg et al. and Bell Aliant et al. argued, for example, that the Commission lacks authority to make the determination it did, given that the Commission has, in the past, forborne with respect to section 31 of the Act. They also argued that the Commission has no jurisdiction to order the Agency's CEO to ignore the requirement for case-by-case consideration of whether a given contractual limitation of liability clause is enforceable.
25. Bell Aliant et al. also argued that the Agency is not equipped to make the complex legal and factual findings necessary to determine whether a given limitation of liability is enforceable. In their view, tasking the Agency with making such determinations would be inconsistent with the Agency's processes, which are designed to provide an accessible and expedient forum for the resolution of disputes. Bragg et al. and Bell Aliant et al. further argued that the Commission had failed to consider certain principles advanced during the original proceeding, including the principle of procedural proportionality.
26. SaskTel and Primus indicated their support for the above arguments. Primus submitted that the effect of the Commission's determination on this matter was also to regulate, for the first time, a reseller's limitations of liability.

27. The Commission notes that in Telecom Decision 2007-130 it determined that in order for the Agency to be effective, its CEO should have the power to award meaningful monetary compensation to successful complainants. The Commission considered that in order to fulfil this objective, it would be inappropriate for the Agency's CEO to be constrained by the members' contractual limitation of liability clauses.
28. The Commission remains of the view that for the Agency to be effective, the Agency's CEO ought not to be constrained by contractual limitations of liability that would prevent the CEO from awarding consumers meaningful financial compensation where appropriate.
29. The Commission notes that the arguments advanced by Bragg et al. and Bell Aliant et al. build on their view that the Commission does not have the authority to order that the Agency's CEO not be bound by contractual limitation of liability clauses. The Commission also notes, however, that it did not make such an order. Rather, in Telecom Decision 2007-130, the Commission determined that in order to receive its approval, all applicable Agency documents were to be amended such that the Agency's CEO is not constrained by contractual limitation of liability clauses.
30. The Commission notes that in Telecom Decision 2007-130, it considered that in order for the Agency to be effective, its CEO should have the power to award compensation up to a maximum limit of \$5,000 per complaint for losses incurred. In this regard, the Commission clarifies that the compensation at issue is for losses actually incurred and, as such, does not contemplate amounts to be awarded as punitive or exemplary damages. The Commission also clarifies that the complainant has the obligation to demonstrate the existence and the amount of losses actually incurred.
31. With respect to losses actually incurred, the Commission agrees with Bell Aliant et al.'s view that if all applicable Agency documents were revised such that the Agency's CEO was not constrained by contractual limitations of liability clauses, member TSPs could, depending on the circumstances, be exposed to liability beyond direct damages, such as for indirect and consequential damages.
32. The Commission considers that making the findings required to ascertain the existence and amount of damages beyond direct damages would run counter to a central purpose of the Agency, namely to establish and provide consumers with an expeditious and economic alternative for resolution of their complaints. The Commission notes that rulings from the Agency's CEO would not act to prevent dissatisfied consumers from litigating their complaints before small claims or other civil courts. The Commission considers that the civil court system is a more appropriate venue for making the complex determinations that arise with respect to damages other than direct damages.
33. In light of the above, the Commission varies the second sentence of paragraph 88 and the first bullet of paragraph 90 of Telecom Decision 2007-130 as follows (modifications indicated in bold):

88. ... The Commission considers that it would be inappropriate to allow a limitation of liability clause in a customer contract to effectively overrule a binding decision made by the CEO **regarding direct damages**

since doing so would effectively render illusory the Agency's ability to award consumers meaningful financial compensation.

90. The Commission's approval is conditional on all applicable Agency documents being amended

- such that the CEO is not, in the case of binding decisions, constrained by contractual limitations of liability **when assessing and providing a monetary remedy for direct damages actually sustained**; and

**III. Is there substantial doubt as to the correctness of the Commission's request that the Agency report back to the Commission on its review of whether and how collective and representative complaints should be accepted and processed by the Agency?**

34. In Telecom Decision 2007-130, the Commission requested that the Agency report back to it within three months of the date of the Decision on its revised procedural code, reflecting, among other matters, its board of directors' review of whether it should accept and how it would proceed with collective and representative complaints.
35. Bragg et al. expressed concern about the Commission's conclusion that the Agency should address collective and representative complaints, while CIPPIC and PIAC were of the view that the Commission's conclusion regarding these types of complaints was correct.
36. Bragg et al. submitted that adjudication of collective and representative complaints would give rise to complex procedural issues. They argued that the Agency's streamlined and expedited procedures are not equipped to address these complexities in a fair and efficient manner.
37. SaskTel and Primus supported the above arguments. SaskTel submitted that the acceptance and resolution of such complaints was beyond the Agency's scope and mandate as proposed in the Order.
38. The Commission notes that in Telecom Decision 2007-130, it rendered no binding determination on the issue of the Agency's handling of collective and representative complaints. Rather, the Commission requested that the Agency consider accepting such complaints and report back to the Commission on its determination.
39. The Commission remains of the view that allowing consumers the option of pursuing their complaints either individually or collectively, with or without the assistance of a representative consumer organization, would help enhance the accessibility and effectiveness of the Agency.
40. The Commission is concerned, however, that Telecom Decision 2007-130 could lead to ambiguity about whether a decision by the Agency to accept a collective or representative complaint for resolution might give rise to what in effect amounts to unlimited liability.
41. In this regard, the Commission is concerned that Telecom Decision 2007-130 could be interpreted to mean that a given collective or representative complaint filed on behalf of more than one consumer should be treated as more than one individual complaint. Under that interpretation, an Agency member could be exposed to liability for damages up to the

maximum awardable amount multiplied by the number of complainants participating in the collective or representative complaint. This was not the Commission's intention regarding collective and representative complaints accepted for resolution by the Agency.

42. In light of the above, the Commission varies the first bullet of paragraph 109 of Telecom Decision 2007-130 as follows (modifications indicated in bold):

109. The Commission requests that the Agency report to the Commission on the following matters:

- the acceptance of (a) any complaint made via telephone, email, and TTY; (b) collective complaints; and (c) complaints made by a consumer organization on behalf of one or more consumers – **with any (b) or (c) complaint accepted for resolution by the Agency treated as a single complaint for the purposes of the maximum awardable amount as set out in amended paragraph 90 of Telecom Decision 2007-130;**

Secretary General

### **Related documents**

- *Establishment of an independent telecommunications consumer agency*, Telecom Decision CRTC 2007-130, 20 December 2007
- *Proceeding to consider the organization and mandate of the Commissioner for Complaints for Telecommunications Services*, Telecom Public Notice CRTC 2007-16, 22 August 2007

*This document is available in alternative format upon request, and may also be examined in PDF format or in HTML at the following Internet site: <http://www.crtc.gc.ca>*