



Telecom Order CRTC 2019-36

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Determination of costs award with respect to the participation of the Forum for Research and Policy in Communications in the proceeding that led to Telecom Decision 2018-384

Application

1. By letter dated 26 June 2018, the Forum for Research and Policy in Communications (FRPC) applied for costs with respect to its participation in the proceeding that led to Telecom Decision 2018-384 (the proceeding). In the proceeding, the Commission considered a proposal for a website blocking regime to address copyright piracy. The proposal was brought forward by Asian Television Network International Limited (ATN), on behalf of the FairPlay Coalition (FairPlay).¹
2. The Commission did not receive any interventions in response to the application for costs.
3. The FRPC submitted that it had met the criteria for an award of costs set out in section 68 of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (the Rules of Procedure) because it represented a group or class of subscribers that had an interest in the outcome of the proceeding, it had assisted the Commission in developing a better understanding of the matters that were considered, and it had participated in a responsible way.
4. In particular, the FRPC submitted that it represents the views of Canadians who believe that the proposed Independent Piracy Review Agency (IPRA) regime poses the risks of website blocking in error and a widening of online censorship. The FRPC further submitted that it represents this group in part through its membership, in part from its review of the relevant literature, in part through its expertise in Canadian law and international website blocking, and in part through the results of a

¹ FairPlay comprises more than 25 stakeholders, including broadcasting and telecommunications companies (e.g. ATN, Bell Canada, the Canadian Broadcasting Corporation, Cogeco Connexion Inc., Corus Entertainment Inc., Ethnic Channels Group Limited, Quebecor Media Inc., and Rogers Communications Canada Inc.), unions and organizations associated with the broadcasting industry (e.g. the Alliance of Canadian Cinema, Television and Radio Artists; l'Association québécoise de l'industrie du disque, du spectacle et de la vidéo; and l'Union des artistes), and organizations linked to the film and/or broadcasting industries (e.g. Cineplex Entertainment LP and the Toronto International Film Festival).

national interactive voice response survey of 829 adult telecommunications service users from across Canada's 10 provinces. The FRPC commissioned this survey from Access Research Inc., which asked Canadians about their experience of visiting websites by accident, their views on the potential for websites to be blocked incorrectly, and their views on the possibility for the Commission or another branch of the federal government to block websites for reasons other than copyright infringement.

5. The FRPC further submitted that it had assisted the Commission in developing a better understanding of the matters that were considered by, among other things, providing a 94-page written submission (not including appendices). The submission addressed topics including the nature and operation of the proposed IPRA, Canadians' concerns about online censorship, and the interaction of the IPRA with Canadian law and policy related to human rights, copyright, and telecommunications.
6. The FRPC submitted that it participated in the proceeding in a responsible way by adhering to the Rules of Procedure and the deadlines the Commission set, and through its reasonable and timely participation with respect to the procedural requests made throughout the proceeding. The FRPC also submitted that the fact-based evidence upon which it based its arguments and its detailed examination of the arguments and evidence presented by FairPlay also demonstrate its responsible participation in the proceeding.
7. The FRPC requested that the Commission fix its costs at \$81,998.45, consisting of \$66,359.25 for legal fees and \$15,639.20 for disbursements. The FRPC's claim included the Ontario Harmonized Sales Tax (HST) for both the legal fees and the disbursements. The FRPC filed a bill of costs with its application.
8. Specifically, the FRPC claimed 126.9 hours for senior external counsel at a rate of \$250 per hour and 200 hours for junior external counsel at a rate of \$135 per hour. The \$15,639.20 disbursement claimed by the FRPC is entirely for the interactive voice response survey conducted by Access Research Inc.
9. The FRPC submitted that the responsibility for payment of the costs sought in this application should be apportioned to the members of FairPlay, or in another manner decided by the Commission.

Procedural letter

10. Commission staff sent a [procedural letter](#), dated 28 November 2018, to the FRPC and to potential costs respondents seeking comments on how any costs awarded in this case should be allocated. Bragg Communications Incorporated, carrying on business as Eastlink (Eastlink); the British Columbia Broadband Association (BCBA); the Canadian Communication Systems Alliance Inc. (CCSA); the Canadian Network Operators Consortium Inc. (CNOOC); Shaw Communications Inc. (Shaw); TekSavvy Solutions Inc. (TekSavvy); TELUS Communications Inc. (TCI);

Xplornet Communications Inc. (Xplornet); the Canadian Internet Policy and Public Interest Clinic, jointly with OpenMedia Engagement Network (CIPPIC/OpenMedia); the FRPC; the Public Interest Advocacy Centre (PIAC); and l'Union des consommateurs (l'Union) provided additional comments.

11. The BCBA, CIPPIC/OpenMedia, the FRPC, and PIAC argued that the Commission's general practice of allocating costs based on telecommunications operating revenues (TORs)² should be maintained for reasons including expediency and consistency with past practice, and the fact that all of the telecommunications service providers that intervened in the proceeding had an interest in its outcome. In contrast, CNO, Eastlink, Shaw, TCI, TekSavvy, l'Union, and Xplornet argued that FairPlay should be responsible for 100% of any costs award granted by the Commission given that the proceeding, at its core, sought the protection of copyright interests, and that telecommunications service providers that were not part of FairPlay would bear an unreasonable and disproportionate amount of the apportionment of costs if the general practice of allocating costs based on TORs were applied. The CCSA noted that it should not be held responsible for a costs award because its members are small, resulting in the difficult and inefficient collection of costs, and because its submission in the proceeding was very brief.

Commission's analysis and determinations

12. The criteria for an award of costs are set out in section 68 of the Rules of Procedure, which reads as follows:

68. The Commission must determine whether to award final costs and the maximum percentage of costs that is to be awarded on the basis of the following criteria:

- (a) whether the applicant had, or was the representative of a group or a class of subscribers that had, an interest in the outcome of the proceeding;
- (b) the extent to which the applicant assisted the Commission in developing a better understanding of the matters that were considered; and
- (c) whether the applicant participated in the proceeding in a responsible way.

13. In Telecom Information Bulletin 2016-188, the Commission provided guidance regarding how an applicant may demonstrate that it satisfies the first criterion with respect to its representation of interested subscribers. In the present case, the FRPC has demonstrated that it meets this requirement, since it represents Canadians who

² TORs consist of Canadian telecommunications revenues from local and access, long distance, data, private line, Internet, and wireless services.

believe that the proposed IPRA regime could result in wider online censorship and the blocking of websites in error. The FRPC's intervention included details as to why the proposed IPRA regime could lead to these outcomes, elaborating on the FRPC's membership and expertise, the commissioned survey and its results, and a review of the relevant literature and law.

14. The FRPC has also satisfied the remaining criteria through its participation in the proceeding. In particular, the FRPC's submissions, especially on copyright law and policy, assisted the Commission in developing a better understanding of the matters that were considered.
15. Accordingly, the Commission finds that the FRPC meets the criteria for an award of costs under section 68 of the Rules of Procedure.
16. The rates claimed in respect of legal fees and disbursements are in accordance with the rates established in the *Guidelines for the Assessment of Costs*, as set out in Telecom Regulatory Policy 2010-963. The Commission finds that the total amount claimed by the FRPC was necessarily and reasonably incurred and should be allowed.
17. This is an appropriate case in which to fix the costs and dispense with taxation, in accordance with the streamlined procedure set out in Telecom Public Notice 2002-5.
18. The Commission has generally determined that the appropriate costs respondents to an award of costs are the parties that have a significant interest in the outcome of the proceeding in question and have participated actively in that proceeding.
19. The Commission considers that the following parties had a significant interest in the outcome of the proceeding and participated actively in the proceeding: the BCBA, the CCSA, CNOC, Eastlink, FairPlay, the Independent Telecommunications Providers Association, Shaw, TCI, TekSavvy, and Xplornet. Therefore, these parties are the appropriate costs respondents to the FRPC's application for costs.
20. The Commission notes that its general practice is to allocate the responsibility for the payment of costs among costs respondents based on their TORs. In general, the Commission considers that TORs are indicators of the relative size and interest of the parties involved in proceedings. However, if the Commission were to apply its normal approach to the allocation of costs among costs respondents in this case, FairPlay would be responsible for few, if any, of these costs, since its members are primarily broadcasting companies (rather than telecommunications companies) and do not report significant, if any, TORs. The Commission considers that such an outcome would not appropriately reflect the significant interest that FairPlay's members had in the outcome of the proceeding. However, allocation of the responsibility for payment of costs entirely to FairPlay would ignore the interests of the telecommunications service providers that participated in the proceeding and whose submissions generally addressed how the proposed website blocking regime would affect their telecommunications businesses.

21. In the circumstances of this case, the Commission considers that it would be appropriate to allocate 85% of the costs to FairPlay and 15% of the costs among all other costs respondents based on their TORs as an indicator of the relative size and interest of the parties involved in the proceeding.³
22. However, as set out in Telecom Order 2015-160, the Commission considers \$1,000 to be the minimum amount that a costs respondent should be required to pay due to the administrative burden that small costs awards impose on both the applicant and costs respondents.
23. Accordingly, the Commission finds that the responsibility for payment of costs should be allocated as follows:

Party	Percentage	Amount
FairPlay	85%	\$69,698.68
TCI	13.2%	\$10,858.53
Shaw	1.8%	\$1,441.24

24. Consistent with its general approach articulated in Telecom Costs Order 2002-4, the Commission makes ATN, which filed the application on behalf of FairPlay, responsible for payment on behalf of FairPlay's members. The Commission leaves it to FairPlay's members to determine the appropriate allocation of the costs among themselves.

Directions regarding costs

25. The Commission **approves** the application by the FRPC for costs with respect to its participation in the proceeding.
26. Pursuant to subsection 56(1) of the *Telecommunications Act*, the Commission fixes the costs to be paid to the FRPC at \$81,998.45.
27. The Commission **directs** that the award of costs to the FRPC be paid forthwith by ATN, TCI, and Shaw according to the proportions set out in paragraph 23 above.

Secretary General

³ In this order, the Commission has used the TORs of the costs respondents based on their most recent audited financial statements.

Related documents

- *Asian Television Network International Limited, on behalf of the FairPlay Coalition – Application to disable online access to piracy websites*, Telecom Decision CRTC 2018-384, 2 October 2018
- *Guidance for costs award applicants regarding representation of a group or a class of subscribers*, Telecom Information Bulletin CRTC 2016-188, 17 May 2016
- *Determination of costs award with respect to the participation of the Ontario Video Relay Service Committee in the proceeding initiated by Telecom Notice of Consultation 2014-188*, Telecom Order CRTC 2015-160, 23 April 2015
- *Revision of CRTC costs award practices and procedures*, Telecom Regulatory Policy CRTC 2010-963, 23 December 2010
- *New procedure for Telecom costs awards*, Telecom Public Notice CRTC 2002-5, 7 November 2002
- *Action Réseau Consommateur, the Consumers' Association of Canada, Fédération des associations coopératives d'économie familiale and the National Anti-Poverty Organization application for costs – Public Notice CRTC 2001-60*, Telecom Costs Order CRTC 2002-4, 24 April 2002