



## Telecom Order CRTC 2019-37

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### **Determination of costs award with respect to the participation of the Public Interest Advocacy Centre in the proceeding that led to Telecom Decision 2018-384**

#### **Application**

1. By letter dated 27 June 2018, the Public Interest Advocacy Centre (PIAC) 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).<sup>1</sup>
2. FairPlay filed an intervention, dated 9 July 2018, in response to PIAC's application. PIAC filed a reply dated 11 July 2018.
3. PIAC 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, PIAC submitted that it represents the interests of consumers across Canada, with a particular focus on vulnerable consumers. PIAC argued that it represents these consumers through its corporate objective of making representations to governing authorities on behalf of the public at large or on behalf of public interest groups with respect to matters of public concern and interest. PIAC also submitted that it represents a number of individuals (through its board of directors) and

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<sup>1</sup> 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).

organizational members including the Alberta Council on Aging, Dying with Dignity Canada, the Federation of Metro Tenants' Associations, the Ontario Society of Senior Citizens' Organizations, the PEI Council of People with Disabilities, Pensioners Concerned, and Rural Dignity of Canada. PIAC noted that in the past, it has conducted extensive research related to consumer interests, including the production of recent reports on affordability in the telecommunications and broadcasting markets. PIAC noted that it is also engaged in ongoing research related to choice in telecommunications and broadcasting service providers and the development of an Internet code of conduct.

5. With respect to the group or class of subscribers that PIAC submitted it represents, PIAC explained that it ascertained the interests of consumers primarily through an economic analysis of FairPlay's proposed Independent Piracy Review Agency based on the evidence that FairPlay presented. PIAC submitted that its views were supported by its consultations and public interventions with consumers and citizen groups primarily through social media.
6. PIAC also submitted that it assisted the Commission in developing a better understanding of the matters that were considered through its economic and legal analyses. PIAC noted that it offered a distinct point of view as the main intervener concerned with the affordability of communications services for consumers.
7. PIAC further submitted that it participated in the proceeding in a responsible way and generally complied with the Rules of Procedure throughout the proceeding.
8. PIAC requested that the Commission fix its costs at \$52,383.61, consisting of \$30,283.37 for legal fees and \$22,100.24 for expert witness fees. PIAC's claim included the Ontario Harmonized Sales Tax (HST) on fees less the rebate to which PIAC is entitled in connection with the HST. PIAC filed a bill of costs with its application.
9. Regarding its legal fees, PIAC claimed 170.7 hours for junior external counsel at a rate of \$135 per hour and 17.3 hours for senior external counsel at a rate of \$290 per hour. PIAC also claimed 4.75 days for an articling student at an in-house rate of \$235 per day. Regarding its expert witness fees, PIAC claimed 94.5 hours at a rate of \$225 per hour for a report prepared by Ariel Katz, Associate Professor in the Faculty of Law at the University of Toronto, where he is also Innovation Chair in Electronic Commerce. Professor Katz's evidence focused on the economics of broadcasting and copyright infringement.
10. PIAC submitted that FairPlay's members should be jointly and severally liable to pay any costs awarded by the Commission. This would provide FairPlay with the flexibility to divide the costs award between its members as they deem appropriate.

### **Answer**

11. FairPlay raised four main concerns regarding PIAC's costs application.

12. First, regarding PIAC's representation of a group or class of subscribers, FairPlay argued that PIAC did not provide evidence concerning how its consultations were performed or the methodology it used to collect feedback from the group or class of subscribers it purported to represent. Further, FairPlay argued that PIAC's participation was analogous to an individual making representations to the Commission and that, consequently, it should not be compensated through the Commission's costs award process.
13. Second, regarding PIAC's costs claim related to its legal fees, FairPlay argued that PIAC disproportionately relied on external counsel, rather than on its articling student. In particular, FairPlay submitted that much of the research and drafting activities undertaken by PIAC's junior external counsel should have been undertaken by the articling student. Consequently, FairPlay called for the reduction of PIAC's legal fee claim by at least \$10,000.
14. Third, regarding PIAC's costs claim related to its expert witness, FairPlay indicated that the expert witness billed an excessive number of hours for the preparation of his report. Consequently, FairPlay called for the reduction of PIAC's expert witness fee claim by 25%.
15. Finally, regarding PIAC's participation in the proceeding, FairPlay argued that PIAC and its expert witness made copyright arguments that were contrary to the *Copyright Act* and, as a result, they could not have assisted the Commission in developing a better understanding of the matters that were considered. Consequently, FairPlay called for the reduction of PIAC's entire costs claim by 50%.

## **Reply**

16. In reply, PIAC argued that the Commission has, on multiple occasions, accepted that PIAC represents consumers, and in particular, vulnerable consumers. PIAC stated that its corporate objective demonstrates that it represents consumers across Canada, with a particular concern for vulnerable consumers. PIAC added that it represents a number of individual and organizational members, and that it is held accountable for its representation of the public interest through a volunteer board of directors from across Canada. PIAC further argued that its social media postings were an efficient and cost-efficient way of gauging Canadians' opinions and that it could not design, afford, and run a public opinion survey in the time provided.
17. PIAC submitted that the research and drafting tasks undertaken by junior external counsel were appropriate given the importance of the file and the complexity of the issues in the proceeding. PIAC noted that it is not obligated to use the cheapest resources available, but that it is obligated to ensure that its costs are reasonably incurred.
18. PIAC stated that its expert witness costs were reasonably incurred and took issue with non-experts arguing that an expert should have taken less time to conduct his work.

19. Finally, PIAC argued that its participation in the proceeding was responsible and that the fact that it put forward different legal arguments on a matter should not result in the reduction of a costs award.

### **Procedural letter**

20. Commission staff sent a [procedural letter](#), dated 28 November 2018, to PIAC 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. (CNOc); 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 Forum for Research and Policy in Communications (FRPC); PIAC; and l'Union des consommateurs (l'Union) provided additional comments.
21. The BCBA, CIPPIC/OpenMedia, the FRPC, and PIAC argued that the Commission's general practice of allocating costs based on telecommunications operating revenues (TORs)<sup>2</sup> should be maintained for reasons including expediency, 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, CNOc, 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**

22. 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:

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

- (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.
23. 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, PIAC has demonstrated that it meets this requirement. PIAC's corporate objective, board, organizational members, and consultations and public interventions through social media demonstrate that PIAC represents the interests of Canadian consumers, and in particular, vulnerable consumers.
24. PIAC has also satisfied the remaining criteria through its participation in the proceeding. In particular, PIAC's copyright submissions, although novel, remained relevant and assisted the Commission in developing a better understanding of the matters that were considered. FairPlay's application itself proposed a novel use of the *Telecommunications Act*, so the proceeding should have been expected to result in the advancement of unconventional or otherwise innovative arguments by interveners.
25. Accordingly, the Commission finds that PIAC meets the criteria for an award of costs under section 68 of the Rules of Procedure.
26. The rates claimed in respect of legal fees and expert witness fees 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 proceeding involved complex issues for which FairPlay relied on senior external counsel to advocate for its position. It would be unfair for the Commission to require that PIAC rely on the cheapest available representation given the legal, technical, and policy implications of the proceeding. Likewise, the amount of time claimed by the expert witness to prepare his report is not unreasonable or unnecessary given the nature of the proceeding. Accordingly, the Commission finds that the total amount claimed by PIAC was necessarily and reasonably incurred and should be allowed.
27. 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.
28. 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.

29. 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 PIAC's application for costs.
30. The Commission notes that its general practice is to allocate the responsibility for 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.
31. 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.<sup>3</sup>
32. 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.

Accordingly, the Commission finds that the responsibility for payment of costs should be allocated as follows:

<b>Party</b>	<b>Percentage</b>	<b>Amount</b>
FairPlay	85%	\$44,526.07
TCI	15%	\$7,857.54

33. 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.

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

## Directions regarding costs

34. The Commission **approves** the application by PIAC for costs with respect to its participation in the proceeding.
35. Pursuant to subsection 56(1) of the *Telecommunications Act*, the Commission fixes the costs to be paid to PIAC at \$52,383.61.
36. The Commission **directs** that the award of costs to PIAC be paid forthwith by ATN and TCI according to the proportions set out in paragraph 33 above.

Secretary General

## 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