



## Telecom Order CRTC 2017-364

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Ottawa, 16 October 2017

*File numbers: 1011-NOC2016-0293 and 4754-556*

### **Determination of costs award with respect to the participation of the Coalition in the proceeding that led to Telecom Regulatory Policy 2017-200**

#### **Application**

1. By letter dated 27 March 2017, the Coalition<sup>1</sup> applied for costs with respect to its participation in the proceeding that led to Telecom Regulatory Policy 2017-200 (the proceeding). In the proceeding, the Commission undertook a review of the Wireless Code (the Code).
2. TELUS Communications Company (TCC) filed an intervention, dated 6 April 2017, in response to the Coalition's application.
3. The Coalition 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 Coalition submitted that it represented the interests of Canadian subscribers to wireless services. The Coalition argued that it made unique contributions to the proceeding, especially with respect to, for example, the issue of device unlocking, which reflected its expertise and experience in advocacy on wireless service issues.
5. With respect to the group or class of subscribers that the Coalition has submitted it represents, the Coalition explained that it is composed of multiple member organizations, several of which specifically represent Canadian seniors. The Coalition added that its preparation for the hearing involved research on consumer issues related to the Code.

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<sup>1</sup> The Coalition consists of the Consumers' Association of Canada, the Council of Senior Citizens' Organizations of British Columbia, the National Pensioners Federation, and the Public Interest Advocacy Centre.

6. The Coalition requested that the Commission fix its costs at \$57,628.02, consisting of \$55,081.92 for legal fees, \$2,350.00 for analyst fees, and \$196.10 for disbursements. The Coalition's claim included the Ontario Harmonized Sales Tax (HST) on fees for external legal counsel, less the rebate to which it is entitled in connection with the HST. The Coalition filed a bill of costs with its application.
7. Specifically, the Coalition's fees claim included the following:
  - \$20,062.71 for Mr. Geoff White, claimed at the intermediate external legal counsel rate (93.7 hours at \$206 per hour);
  - \$8,711.21 for Mr. John Lawford, claimed at the senior external legal counsel rate (28.9 hours at \$290 per hour);
  - \$20,608 for Mr. Ben Segel-Brown, claimed at the external articling student rate (294.4 hours at \$70 per hour);
  - \$5,700 for Ms. Alysia Lau, claimed at the internal legal counsel rate (9.5 working days at \$600 per day); and
  - \$2,350 for Mr. Jonathan Bishop, claimed at the internal analyst rate (5 working days at \$470 per day).
8. The Coalition submitted that the wireless service providers that participated in the proceeding are the appropriate parties to be required to pay any costs awarded by the Commission (the costs respondents).
9. The Coalition submitted that the responsibility for payment of costs should be allocated among the costs respondents based on their telecommunications operating revenues (TORs).<sup>2</sup>
10. In response to a Commission staff letter to potential costs respondents regarding how any costs awarded in this case should be allocated, Bell Mobility Inc. (Bell Mobility); Quebecor Media Inc., on behalf of Videotron G.P. (Videotron); and TCC provided additional comments.

## **Answer**

11. TCC argued that the Coalition should not be entitled to claim costs for the work done by one of its legal counsel, Mr. John Lawford, at the external rate. In TCC's view, given that Mr. Lawford is the Executive Director of the Public Interest Advocacy Centre (PIAC), one of the Coalition's member organizations, it would be appropriate for the Coalition to claim fees in respect of his work at the internal rate.

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<sup>2</sup> As set out in previous Commission orders, TORs consist of Canadian telecommunications revenues from local and access, long distance, data, private line, Internet, and wireless services.

12. TCC submitted that if the Commission awards costs to the Coalition, allocation of the responsibility for payment of costs among costs respondents should be based on wireless revenues rather than on TORs, given that the subject matter of the proceeding focused exclusively on wireless services. TCC noted that certain information regarding wireless revenues appears in the Commission's annual *Communications Monitoring Report*.
13. Videotron supported TCC, indicating that in the circumstances, it would be unreasonable to allocate costs based on telecommunications revenues that did not stem from the provision of wireless services.
14. Bell Mobility argued that there was no reason to deviate from the Commission's general practice of allocating costs on the basis of TORs. It submitted that potential costs respondents are free to structure their affairs such that separate legal entities report telecommunications revenues to the Commission for wireless and wireline business segments respectively.

### **Additional process**

15. On 9 June 2017, Commission staff sent a letter requesting that PIAC make submissions regarding the status of Mr. Lawford as reported to the law society of which he was a member at the time several costs applications were made, including the present one, with supporting documentation. PIAC was also invited to make submissions on its relationship with the articling students for whom costs were claimed related to several proceedings, confirming (i) the principal of each articling student, (ii) the principal's status as reported to the law society of which he or she is a member, (iii) whether the articling students performed any work for PIAC under the supervision of legal counsel other than the principal, and (iv) whether the articling students worked for any clients of the principal other than PIAC. PIAC was also given an opportunity to make submissions on why an exception to the *Guidelines for the Assessment of Costs* (the Guidelines) should be considered in relation to Mr. Lawford's status and the articling students' status as external to PIAC.
16. PIAC responded on 26 June 2017.<sup>3</sup> Bell Canada and TCC submitted answers, both dated 7 July 2017. PIAC filed a final reply dated 12 July 2017.
17. With respect to the status of Mr. Lawford, PIAC explained that Mr. Lawford was unintentionally in the administrative category of "Practicing Law – Employed" with the Law Society of Upper Canada (LSUC), since he believed that he was categorized as "In Private Practice." PIAC submitted that the error occurred due to his previous employment as a lawyer internal to PIAC between 2003 and 2006, after which he transitioned into his own law practice. PIAC submitted that based on a long-standing arrangement between it and the LSUC, Mr. Lawford paid only half of the Lawyers' Professional Indemnity Company (LAWPRO) insurance fees given the special nature

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<sup>3</sup> PIAC sent a request, dated 12 June 2017, to extend the response deadline to 26 June 2017. Commission staff allowed the extension.

of his practice, and that, accordingly, he reported his status as “Practicing Law – Employed” to the LSUC despite being in private practice.

18. PIAC submitted, with supporting documentation, that in Mr. Lawford’s 2016 Annual Report,<sup>4</sup> which is filed with the LSUC annually, he requested that the LSUC revise his status from “Practicing Law – Employed” to “In Private Practice” in light of concerns raised in the proceeding that led to Telecom Order 2017-95,<sup>5</sup> and to make this status retroactive to 1 January 2017.
19. PIAC argued that the Commission should consider factors other than how a lawyer reports to his or her law society in determining the appropriate rates to use in costs claims. PIAC submitted that (i) it does not pay a salary to Mr. Lawford, but a retainer based upon his legal work, (ii) Mr. Lawford has filed his income taxes on his law practice as a sole practitioner since 2006, (iii) Mr. Lawford operates as legal counsel to other consumer groups, and (iv) Mr. Lawford now reports to LAWPRO as “Sole Practitioner” and not “Practicing Law – Employed” in response to the concerns raised in Telecom Order 2017-95.
20. PIAC also distinguished Mr. Lawford’s position as Executive Director and General Counsel at PIAC from his role as external legal counsel. PIAC submitted that in his role as PIAC’s General Counsel, Mr. Lawford leads the legal strategies and work for PIAC but he does not receive a salary or employment income from PIAC. PIAC referenced previous Commission decisions, such as Telecom Costs Order 2008-11, in which the Commission determined that external legal fees could be claimed for the former Executive Director and General Counsel of PIAC based on considerations such as how the legal counsel billed PIAC for services, whether they paid their own overhead and insurance, whether they paid the Goods and Services Tax (GST) on services provided to PIAC, and whether they were exempt from paying LAWPRO insurance fees.
21. With respect to the status of the articling students, PIAC indicated that the students at PIAC are articulated to Mr. Lawford as principal, as per the articles of clerkship filed with the LSUC.<sup>6</sup> PIAC submitted that the students are paid via a Law Foundation of Ontario fellowship, under which PIAC holds the funds for the students and disburses them regularly. PIAC argued that when students are working on matters for which Mr. Lawford is outside counsel, they are working for him alone and not for PIAC. PIAC submitted that it is one of the only consumer advocacy groups offering articling students employment and that without external funding, it would not be economical

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<sup>4</sup> The LSUC 2016 Annual Report covers the period from 1 April 2016 to 31 March 2017.

<sup>5</sup> In the proceeding that led to Telecom Order 2017-95, the Affordable Access Coalition (of which PIAC was a part-member) claimed costs for Mr. Lawford at the external rate. TCC and Bell Canada submitted that Mr. Lawford was internal to PIAC, as per his status with the LSUC as “Practicing Law – Employed” and that the articling students were internal resources as well and that the Affordable Access Coalition was, therefore, only entitled to costs for them at the in-house rate.

<sup>6</sup> PIAC provided a copy of the articles of clerkship as supporting evidence.

for PIAC to continue to employ articling students on Commission files in part due to the time commitment required for senior counsel to provide training and supervision.

22. In the event that the Commission determines that Mr. Lawford and the articling students are in-house resources, PIAC asked that the Commission exercise its discretion and allow the costs claimed at the external rate given PIAC's financial circumstances and the fragility of public interest advocacy.
23. Bell Canada recognized that Mr. Lawford has amended how he reports his status to the LSUC, but submitted that even if Mr. Lawford is a sole practitioner, there is no evidence that the articling students are employed by Mr. Lawford's private law practice. Bell Canada referenced the articles of clerkship, which explicitly identify PIAC as the "firm/employer" of the articling students.
24. Bell Canada indicated that PIAC directly receives funding from a fellowship to enable it to hire an articling student, which is documented as revenue to PIAC in its Statement of Operations for the year ending 31 March 2017. Bell Canada concluded that the Commission should therefore find the articling student position to be internal and adjust the rates accordingly.
25. TCC submitted that while Mr. Lawford now reports to the LSUC as being in private practice, the reporting status of a lawyer should not be the sole indicator of whether related costs should be claimed at the in-house or external rate. TCC listed several other factors that the Commission should consider, including (i) whether the lawyer has clients other than the costs applicant or works exclusively for the costs applicant, (ii) whether the lawyer is paid on an hourly basis or receives regular equal payments, and (iii) whether the lawyer has his or her own office space or works in the office of the costs applicant.
26. In its final reply, PIAC agreed with TCC that the Commission should consider factors other than how a lawyer reports to his or her law society in determining the appropriate rates to use in costs claims. PIAC argued that in cases where Mr. Lawford represents consumer groups before the Commission in a coalition that includes PIAC, the Commission should consider Mr. Lawford's role to be external legal counsel.
27. PIAC also submitted that the Commission should not consider the method of payment that occurs between clients and lawyers because this violates solicitor-client privilege, and that renting space with a locked door at the office of the costs applicant through a lease or sub-lease should meet the test of a lawyer having his or her own office space. Finally, PIAC submitted that the lawyers working for it pay (i) their own overhead and insurance, (ii) the GST/HST on services provided for PIAC, and (iii) their LAWPRO insurance fees.

## Commission's analysis and determinations

### Eligibility

28. 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.

29. The Coalition is an ad hoc collection of public interest organizations representing various types of Canadian consumers to whom the issues raised in this proceeding, which revolved around mobile wireless services, were of substantial interest. Accordingly, in the present case, the Commission finds that the Coalition has met the first criterion related to representation.

30. However, the Commission reminds the Coalition, and its member organizations, that in Telecom Information Bulletin 2016-188 (the Information Bulletin), 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 Coalition did not elaborate on the means of its representation along the lines set out in the Information Bulletin.

31. As stated in the Information Bulletin, an applicant is to make clear how it determines that its positions in a proceeding reflect the interests of a group or class of subscribers. The Commission may insist upon the provision of additional information in this regard in the future.

32. The Coalition has satisfied the remaining criteria through its participation in the proceeding. Specifically, the Coalition made well-researched and clear submissions on a number of topics. Its submissions on the subject of device unlocking, in particular, were especially helpful to the Commission in developing a better understanding of the matters that were considered. Further, the Coalition's reliance on junior and intermediate legal resources, including articling students and counsel, relative to senior legal counsel generally demonstrates its responsible participation in the proceeding.

## **Rates and amounts**

33. The rates claimed in respect of legal and analyst fees are in accordance with the rates established in the Guidelines, as set out in Telecom Regulatory Policy 2010-963. However, the categorization of Mr. Lawford and the articling student in this costs proceeding as being external to PIAC requires further examination.

## **Certain legal fees**

34. The Commission considers that how a lawyer reports to the law society of which he or she is a member is the appropriate test for assessing whether costs should be claimed at the in-house or external rate, despite PIAC's and TCC's submissions that the Commission ought to consider other factors as well. This determination is set out in the Guidelines, which state that in light of the serious repercussions that follow misrepresenting oneself before a law society, the Commission considers that requiring a claimant practising law to attest to the manner in which the claimant reports his or her employment status to any law society of which he or she is a member is a reliable manner of assessing whether counsel may claim an outside-counsel rate.
35. The manner in which a lawyer reports to the appropriate law society constitutes an objective evidentiary piece of information and enables the Commission to avoid resource-intensive analysis on the status of the lawyer. However, the Guidelines do permit a departure from this test in cases where the applicant demonstrates that exceptional circumstances exist.
36. In respect of PIAC's submissions regarding its exceptional circumstances, the purpose of costs awards is to facilitate participation by public interest groups and individuals in Commission proceedings. The test set out in the Guidelines has been in place since 2010, and both Mr. Lawford and PIAC have been aware of how the Commission assesses the status of lawyers to determine whether the in-house or external rate is applicable to costs claims. In the present case, PIAC was aware of the inconsistency between how Mr. Lawford reported to the LSUC and how it claimed costs, and it could have chosen not to pay Mr. Lawford at the external rate based on his LSUC reporting. Further, in relation to PIAC's submission that there is a special arrangement between PIAC and the LSUC regarding Mr. Lawford's reporting status to the LSUC despite being in private practice to pay lower insurance fees, no evidence was submitted to support this claim.
37. In Telecom Order 2017-95, the Commission found that the specific circumstances of the proceeding that led to Telecom Regulatory Policy 2016-496 warranted an exception to the normal rate scale for costs applicable under the Guidelines. The Commission therefore allowed PIAC to claim costs for Mr. Lawford at the external

rate. However, those circumstances were distinct and particular to that proceeding, and they are not present in the current proceeding.<sup>7</sup>

38. The Commission is therefore not convinced that exceptional circumstances exist in the current proceeding to warrant an exception to the test set out in the Guidelines. Accordingly, PIAC is entitled to costs for Mr. Lawford based on the manner in which he reported to the LSUC. The Commission notes that, prior to 1 January 2017, Mr. Lawford reported his status as “Practising Law – Employed” but that, effective 1 January 2017, Mr. Lawford now reports to the LSUC as “In Private Practice.”
39. PIAC claimed 28.9 hours for Mr. Lawford in respect of the proceeding. Of these hours, 1.6 hours were claimed for the period prior to 1 January 2017, and 27.3 hours were claimed for the period after 1 January 2017.
40. For the 1.6 hours, consistent with the Guidelines, PIAC is eligible to calculate Mr. Lawford’s fees at the in-house daily rate of \$800 based on his reporting status to the LSUC and years of practice. Accordingly, the Commission reduces the associated costs claimed from \$482.28 to \$200 for the period prior to 1 January 2017.<sup>8</sup> The Commission considers that this amount was necessarily and reasonably incurred.
41. For the 27.3 hours, PIAC is entitled to calculate costs for Mr. Lawford at the external hourly rate, consistent with how he reports to the LSUC as of 1 January 2017. Accordingly, the Commission finds that the amount of \$8,228.93 for Mr. Lawford’s legal fees for the period after 1 January 2017 was necessarily and reasonably incurred.
42. With respect to the articling students, unlike lawyers, the Guidelines do not provide a specific test for determining an articling student’s status. However, the Commission considers that the articles of clerkship filed with the LSUC provide insight on where a student completes the articling program and the type of practice that occurs at that placement, similar to the information provided by a lawyer to the law society of which he or she is a member.
43. The articles of clerkship list Mr. Lawford as the articling principal for the students. However, they also identify PIAC as the “firm/employer.” Further, PIAC identified the articling student involved in the present proceeding as being internal to PIAC by stating in its response to Commission staff’s request for information that “PIAC is one of the only consumer advocacy groups offering articling employment.” In addition, PIAC pays articling students via a Law Foundation of Ontario fellowship,

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<sup>7</sup> Specifically, the Commission considered that the associated proceeding was lengthy and complex, with high importance for consumer groups and the public interest, and that the Affordable Access Coalition’s contribution was detailed, researched, and of particular importance in setting a baseline for debate on the funding models that could be adopted.

<sup>8</sup> The 1.6 hours claimed at the external rate were converted into 0.25 days, based on a 7-hour work day.

which is identified as revenue on PIAC's Statement of Operations, through regular disbursements similar to a salary. Finally, PIAC's articling students work on its files and claim costs under the supervision of Mr. Lawford or other PIAC lawyers, which demonstrates that their position is internal to PIAC rather than the private law firm of Mr. Lawford.

44. The Commission therefore finds that the articling student involved in the present proceeding is internal to PIAC and is required to calculate his costs using the in-house daily rate. The Commission therefore reduces the costs for the articling student from \$20,608.00 to \$9,928.75, calculated using the rate of \$235 per day.<sup>9</sup> The Commission considers that this amount was necessarily and reasonably incurred.
45. Accordingly, the Commission reduces the total legal fees claimed by the Coalition from \$29,319.21 to \$18,357.68.

#### **Other costs**

46. Apart from the legal fees described above, the remaining amounts claimed in respect of legal and analyst fees and disbursements do not raise concerns. Given the length and scope of the proceeding, among other things, these amounts are reasonable in the circumstances.
47. Accordingly, the Commission finds that the amount of \$46,666.49 was necessarily and reasonably incurred and should be allowed.
48. 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.

#### **Costs respondents and allocation**

49. 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.
50. The Commission considers that Bell Mobility; Bragg Communications Incorporated, operating as Eastlink; Freedom Mobile Inc.; Rogers Communications Canada Inc. (RCCI); Saskatchewan Telecommunications; TCC; and Videotron had a significant interest in the outcome of the proceeding and participated actively throughout the proceeding. Therefore, these parties are the appropriate costs respondents to the Coalition's application for costs.
51. It is the Commission's general practice to allocate the responsibility for the payment of costs among costs respondents based on their TORs. In general, the Commission

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<sup>9</sup> The 294.4 hours claimed at the external rate were converted into 42.25 days, based on a 7-hour work day.

considers that TORs are indicators of the relative size and interest of the parties involved in proceedings.

52. However, in Telecom Order 2017-362, the Commission determined that a deviation from the Commission's general practice was justified on the issue of allocation.
53. In that order, the Commission determined that it would be appropriate to allocate 92% of the applicants' costs in that case between Bell Mobility, RCCI, and TCC, drawing upon the allocation of wireless revenue market share from the most recent time period detailed in the Commission's 2015 *Communications Monitoring Report*. The remaining 8% was to be allocated evenly between the other costs respondents in that case.
54. In general terms, the Commission considers that a similar approach is appropriate in the present case as well, which flows from the same proceeding as Telecom Order 2017-362, and which gives rise to similar considerations.
55. However, this approach must be modified somewhat in the present case. If it were applied strictly and the remaining 8% of the costs award were allocated among the remaining four costs respondents, each one of those four would be responsible for the payment of less than \$1,000 of the award. The Commission considers such an amount, as set out in Telecom Order 2015-160, to be the minimum 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.
56. Accordingly, the Commission finds that the modification applied in Telecom Order 2017-363 should also apply in the present case, and that the remaining 8% of the award should be redistributed proportionally between Bell Mobility, RCCI, and TCC, and ultimate responsibility for the payment of costs is to be allocated as follows:

<b>Company</b>	<b>Percentage</b>	<b>Amount</b>
RCCI	38%	\$17,733.27
Bell Mobility	31.5%	\$14,699.94
TCC	30.5%	\$14,233.28

### **Directions regarding costs**

57. The Commission **approves, with changes**, the application by the Coalition for costs with respect to its participation in the proceeding.
58. Pursuant to subsection 56(1) of the *Telecommunications Act*, the Commission fixes the costs to be paid to the Coalition at \$46,666.49.

59. The Commission **directs** that the award of costs to the Coalition be paid forthwith by RCCI, Bell Mobility, and TCC according to the proportions set out in paragraph 56.

Secretary General

### **Related documents**

- *Determination of costs award with respect to the participation of l'Union des consommateurs in the proceeding that led to Telecom Regulatory Policy 2017-200, Telecom Order CRTC 2017-363, 16 October 2017*
- *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 Regulatory Policy 2017-200, Telecom Order CRTC 2017-362, 16 October 2017*
- *Review of the Wireless Code, Telecom Regulatory Policy CRTC 2017-200, 15 June 2017*
- *Determination of costs award with respect to the participation of the Affordable Access Coalition in the proceeding leading to Telecom Regulatory Policy 2016-496, Telecom Order CRTC 2017-95, 11 April 2017*
- *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*
- *Determination of costs award with respect to the participation of the Public Interest Advocacy Centre in the Telecom Public Notice 2006-14 proceeding, Telecom Costs Order CRTC 2008-11, 13 June 2008*
- *New procedure for Telecom costs awards, Telecom Public Notice CRTC 2002-5, 7 November 2002*