

## Forum for Research and Policy in Communications (FRPC)

### Research Note: The CRTC's cost-orders process in telecommunications

#### I. Public participation in CRTC proceedings

In a recent speech the newly appointed Chairperson of the CRTC emphasized the importance of the public's views to its work, commenting that

... businesses are but one group of stakeholders. They alone cannot control the market. This is why contributions from individual Canadians and consumer-advocate groups are also critical to informing our decisions. We must hear how proposed changes will affect the lives and livelihoods of everyday people across the country—now, more so than ever, given the prevalence and significance of broadband technology. Anything less would be irresponsible. It would be to exclude the public from the public interest.

(Ian Scott, Chairperson and CEO, Canadian Radio-television and Telecommunications Commission, *Remarks to the IIC Canada Communications Law and Policy Conference* [Ottawa, 14 November 2017], [https://www.canada.ca/en/radio-television-telecommunications/news/2017/11/ian\\_scott\\_to\\_theiiccanadacomunicationslawandpolicyconference.html](https://www.canada.ca/en/radio-television-telecommunications/news/2017/11/ian_scott_to_theiiccanadacomunicationslawandpolicyconference.html))

Recent news has, however, raised questions about the continued participation by consumer interest organizations and more generally, the future of public-interest advocacy, at the CRTC.

The Public Interest Advocacy Centre (PIAC), which makes submissions on behalf of Canadian consumers with respect to telecommunications and broadcasting, financial services and airlines, announced several weeks ago that it may also be closing its doors.<sup>1</sup> It said that while applicants must submit their applications for costs in telecommunications proceedings within 30 days of the close of the record of the proceeding, the CRTC is taking longer to process the applications. The result is that cost applicants must also wait longer to pay for the experts and others they have retained; PIAC said that it was waiting for the CRTC to issue decisions about costs applications it had made roughly 18 months earlier.<sup>2</sup>

The purpose of this research and policy note is to determine whether the CRTC's process for dealing with public-interest telecommunications costs applications has changed. It begins by briefly reviewing the purpose of the costs-application process, sets out the method it used to evaluate the CRTC's process, and presents its findings. The note concludes with recommendations for changing the CRTC's approach to funding public participation in its proceedings.

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<sup>1</sup> Cartt.ca, "Consumer group PIAC may shut down due to cash crunch", 9 November 2017, <https://cartt.ca/article/consumer-group-piac-may-shut-down-due-cash-crunch>.

<sup>2</sup> *Ibid.*

*Note:* the Forum for Research and Policy in Communications has an interest in this question, because it has received costs awards through the CRTC's telecommunications costs-application process.<sup>3</sup> These awards have permitted the Forum to retain legal counsel and other experts for its submissions.

## II. Purpose of the CRTC's telecommunications costs-application process

When Parliament transferred responsibility for telecommunications from the Canadian Transport Commission (CTC) to the CRTC in 1976, it also transferred the power to exercise its discretion to grant costs. The *National Transportation Act*<sup>4</sup> already permitted costs to be awarded in the CTC's proceedings:

73. (1) The costs of and incidental to any proceeding before the Commission, except as herein otherwise provided, are in the discretion of the Commission, and may be fixed in any case at a sum certain, or may be taxed.

(2) The Commission may order by whom and to whom any costs are to be paid, and by whom they are to be taxed and allowed.

(3) The Commission may prescribe a scale under which such costs shall be taxed.

"Costs" included "fees, counsel fees and expenses".<sup>5</sup>

The CRTC first set out a costs-application process for telecommunications proceedings two years after it assumed jurisdiction for the sector. In 1978 it noted that such proceedings were often complex and important, that informed participation by the public required expertise, that in turn required payment:

The Commission has concluded that if the objective of informed participation in public hearings is to be met, some form of financial assistance must be made available to responsible interveners, both active and potential, who do not have sufficient funds to properly prosecute their cases, particularly where such interveners represent the interests of a substantial number or class of subscribers. The complexity and importance of the issues which come before the Commission often demand that expert resources be available for their adequate treatment. Such resources are employed by the regulated companies. In the Commission's view, it is critical to, and part of

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<sup>3</sup> *Determination of costs award with respect to the participation of the Forum for Research and Policy in Communications in the proceeding leading to Telecom Regulatory Policy 2016-496*, Telecom Order CRTC 2017-165 (Ottawa, 19 May 2017), <http://www.crtc.gc.ca/eng/archive/2017/2017-165.htm>; *Determination of costs award with respect to the participation of the Forum for Research and Policy in Communications in the proceeding initiated by Broadcasting and Telecom Notice of Consultation 2015-239*, Telecom Order CRTC 2016-156 (Ottawa, 27 May 2016), <http://www.crtc.gc.ca/eng/archive/2016/2016-156.htm>; and *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 (Ottawa, 16 October 2017), <http://www.crtc.gc.ca/eng/archive/2017/2017-362.htm>.

FRPC has also received costs awards from the Broadcasting Participation Fund; see the Broadcasting Participation Fund's lists of claims at <http://www.bpf-fpr.ca/en/home.html>; the Forum's submissions are available on its website (at [www.frpc.net](http://www.frpc.net)).

<sup>4</sup> R.S.C. 1970, c. N-17.

<sup>5</sup> *Ibid.*, s. 2.

the necessary cost of, the regulatory process that such resources also be available to responsible representative interveners.<sup>6</sup>

The CRTC set out five criteria for cost awards. Intervenors with a substantial interest in a proceeding, who participated in it responsibly, contributed to the CRTC's improved understanding of issues, lacked adequate financial resources to make their case, and whose costs were reasonably incurred, could apply for costs.<sup>7</sup> The CRTC also decided that it would not grant costs to intervenors to cover their non-CRTC-related activities.<sup>8</sup>

The CRTC said that, if granted, costs would be paid by "applicants". These initially consisted solely of telecommunications companies; once the CRTC's rules changed to permit non-telecommunications companies to submit applications, the CRTC ordered respondent telecommunications companies to pay costs it approved.)

The CRTC issued its first decision to grant costs in May 1978,<sup>9</sup> and its first taxation-of-costs order in February 1980.<sup>10</sup> In issuing that order the CRTC's Taxation Officer said he had

... interpreted the Commission's decision in light of the knowledge that public participation is a fragile concept, more talked about than realized, that public interest advocacy groups offer a different, but no less valuable, approach to participation than does the traditional solicitor-client form and that a restrictive interpretation of a costs award by the officer responsible for implementing it would serve no useful public purpose.<sup>11</sup>

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<sup>6</sup> *CRTC Procedures and Practices in Telecommunications Regulation*, Telecom Decision CRTC 78-4, (Ottawa, May 1978). [Note: CRTC notices and decisions are available from its website from 1984 on.]

<sup>7</sup> *Ibid.*

52.(1) In any proceeding under this Part, the Commission may award costs against the applicant to any intervenor who

(a) has a substantial interest in the outcome of the proceeding, or represents the interests of a substantial number or class of subscribers,

(b) has participated in a responsible way,

(c) has contributed to a better understanding of the issues by the Commission, and

(d) does not have sufficient financial resources available to enable it to prosecute its interest adequately, having regard to the financial implications of the application for the intervenor, or, where the intervenor represents the interests of a group or class of subscribers, for each member thereof, and the intervenor requires the assistance provided by costs to do so.

...

(5) Costs awarded under this section shall be taxed by the General Counsel of the Commission or by such officer as may be appointed by the Commission, and shall not exceed those necessarily and reasonably incurred by the intervenor in connection with its intervention and, where the Commission has prescribed a scale of costs, shall not exceed the amounts so prescribed.

<sup>8</sup> Telecom Decision CRTC 78-7 (Ottawa, 10 August 1978); see also Telecom Decision CRTC 80-1 (Ottawa, 4 January 1980).

<sup>9</sup> Telecom Decision CRTC 78-7 (Ottawa, 10 August 1978).

<sup>10</sup> CRTC Taxation Order 1980-1 (Ottawa, 10 March 1980) granted costs to the Consumers' Association of Canada (CAC), and to the National Anti-Poverty Organization, Inuit Tapirisat of Canada, Taqramiut Nipingat Inc. and Mr. S.A. Rowan (NAPO). the 1980-1 awarded the specific amounts for which parties applied.

<sup>11</sup> Taxation Order 1980-1.

He also noted the comment from one of the lawyers retained by a cost applicant, pointing out that if costs were not awarded, lawyers would have to write off their work for their public-interest organizations as uncollectible debts, which would “accomplish nothing and would not be conducive to good client relations.”<sup>12</sup>

Bell Canada (Bell) challenged the CRTC's first cost order in a six-year legal battle, and was ultimately unsuccessful. It began by asking the CRTC to overturn the Taxation Officer's order. The CRTC dismissed Bell's appeal of the decision in March 1981, concluding that

... the active participation of established organizations such as CAC and NAPO et al in regulatory proceedings is desirable in view of their continuing interest and knowledge base in the field. In the Commission's view, the adoption of Bell's argument concerning double recovery would in effect mean that only ad hoc organizations could expect to obtain awards of costs from the Commission. Such organizations would not likely have the base for informed participation upon which established organizations such as CAC and NAPO et al can build their specific interventions. Such organizations are called upon to intervene in a number of regulatory proceedings. ...

...

... it would inhibit public interest groups from developing and maintaining expertise in regulatory matters if, in order to be entitled to costs, they had to retain and instruct legal counsel in the manner appropriate to proceedings before the courts in civil matters. ...<sup>13</sup>

The Federal Court of Appeal then dismissed Bell's appeal of the CRTC's 1981 decision in 1983,<sup>14</sup> and in 1986 the Supreme Court of Canada dismissed Bell's appeal of the FCA decision.<sup>15</sup>

The Supreme Court's decision addressed one of the key differences between private and public-interest proceedings:<sup>16</sup> where the parties in court proceedings are, effectively, adversaries, parties in public hearings are not – they are (for the most part) advocating different positions on matters of public policy as defined by legislation. This finding established that the rules for ensuring payment of lawyers which would apply in court proceedings, are not readily transferrable to public-policy proceedings.

The Court concluded in part that the CRTC “should, for example, be able to fix the expense which may be reasonably attributed to a particular participation by a public interest intervener as being deemed to have been incurred ....”<sup>17</sup> It also commented that the CRTC had adopted “a reasonable approach” to compensating public-interest interveners.<sup>18</sup>

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<sup>12</sup> *Ibid.*

<sup>13</sup> Telecom Decision CRTC 81-5 (Ottawa, 9 March 1981).

<sup>14</sup> *Bell Canada v. Consumers' Assoc. of Canada*, [1984] 1 F.C. 79 (F.C.A.)

<sup>15</sup> *Bell Canada v. Consumers' Assoc. of Canada*, [1986] 1 SCR 190.

<sup>16</sup> *I.e.*, *Re Green, Michaels & Associates Ltd. And Public Utilities Board* (1979), 94 D.L.R. (3d) 641.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Bell Canada v. Consumers' Assoc. of Canada*, [1986] 1 SCR 190, at para. 30.

### III. CRTC's current approach to telecommunications costs applications

The CRTC's current authority over costs is based on Parliament's decision to retain a cost-awards power in the 1993 *Telecommunications Act*:

- 56 (1) The Commission may award interim or final costs of and incidental to proceedings before it and may fix the amount of the costs or direct that the amount be taxed.  
(2) The Commission may order by whom and to whom any costs are to be paid and by whom they are to be taxed and may establish a scale for the taxation of costs.

The CRTC has implemented this authority through regulatory policies, information bulletins and determinations. It has recognized that "submissions with which it does not agree may still be eligible for costs".<sup>19</sup>

Until 1997 the CRTC issued determinations about costs applications in two stages. The CRTC would order a taxation officer to determine costs in a taxation process, and the taxation officer would then award costs.<sup>20</sup> In 1998, however, the CRTC stopped using the taxation process in response to public-interest organizations' comments that the growing number of paper-based CRTC proceedings was making the costs-application burdensome. It began to set costs itself<sup>21</sup> in 'costs orders', concluding in 2002 that this 'streamlined' approach was more 'expeditious' and reduced the burden on all parties.<sup>22</sup>

The CRTC issued its current policy on costs applications in its telecommunications proceedings seven years ago, following a request made in 2009 by nine telecommunications companies that it review its cost-award practices.<sup>23</sup> The companies argued that

- The CRTC's approach to costs awards "has now created a virtual free-for-all situation whereby any entity can claim it represents the public interest and, thus, an entitlement for costs"<sup>24</sup> and

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<sup>19</sup> Determination of costs award with respect to the participation of the DiversityCanada Foundation and the National Pensioners Federation in the proceeding initiated by their application to review and vary Telecom Order 2015-240, Telecom Order 2016-185 (Ottawa, 16 May 2016), <http://www.crtc.gc.ca/eng/archive/2016/2016-185.htm>, at para. 17.

<sup>20</sup> *New procedure for Telecom costs awards*, Telecom Public Notice CRTC 2002-5 (Ottawa, 7 November 2002), <http://www.crtc.gc.ca/eng/archive/2002/pt2002-5.htm>, at para 2.

<sup>21</sup> *NEW PROCEDURE FOR TELECOM COSTS AWARDS*, Telecom Public Notice CRTC 98-11 (Ottawa, 15 May 1998), <http://www.crtc.gc.ca/eng/archive/1998/PT98-11.HTM>.

<sup>22</sup> *New procedure for Telecom costs awards*, Telecom Public Notice CRTC 2002-5 (Ottawa, 7 November 2002), <http://www.crtc.gc.ca/eng/archive/2002/pt2002-5.htm>, at para. 6.

The most recent Taxation Order found through the CRTC's search engine in November 2017 was: *Costs awarded to Action Réseau Consommateur et al. - Public Notice CRTC 2001-36*, Telecom Taxation Order CRTC 2003-1 (Ottawa, 16 May 2003), <http://www.crtc.gc.ca/eng/archive/2003/to2003-1.htm>.

<sup>23</sup> *Revision of CRTC costs award practices and procedures*, Telecom Regulatory Policy CRTC 2010-963 (Ottawa, 23 December 2010), <http://www.crtc.gc.ca/eng/archive/2010/2010-963.htm>.

<sup>24</sup> Barrett Xplore Inc., Bell Aliant, Regional Communications, Limited Partnership, Bell Canada, Cogeco Cable Inc., Northwestel Inc., Rogers Communications Inc., Saskatchewan Telecommunications, Shaw Communications Inc., Télébec, Société en commandite, and TELUS Communications Company, *Part VII Application to request a review of the procedures for the awarding of costs*, (25 September 2009), at para. 12.

- The fact that “commercial parties are being required to pay escalating amounts of costs” may lead some to decline to participate in CRTC proceedings to avoid inclusion as a costs respondent, thereby decreasing participation in CRTC regulatory proceedings, and “negatively affecting the discourse of the issues on the record and the ability of the Commission to make sound determinations”<sup>25</sup>

The CRTC’s 2010 regulatory policy modified its telecommunications costs-application process slightly. It clarified that applicants could ask the CRTC to determine their eligibility for costs at the beginning of a proceeding,<sup>26</sup> included additional factors in costs claims which it might consider,<sup>27</sup> and limited the number of costs respondents.<sup>28</sup> It reiterated “that costs awards are intended to encourage the participation of individuals and groups who represent subscriber interests, rather than private interests.”<sup>29</sup>

The 2010 policy requires applicants for costs to

- complete and submit Telecommunications Costs Assessment Forms ([http://www.crtc.gc.ca/eng/forms/form\\_300.htm](http://www.crtc.gc.ca/eng/forms/form_300.htm))
- file detailed and accurate accounts of the costs claimed, recorded on the Summary Sheets, in
  - Form I (for legal counsel, articling students and legal assistants),
  - Form II (for expert witnesses) and
  - Form III (for consultants and analysts),
- invoices and receipts necessary to support those costs where such invoices and receipts are required
- an affidavit of disbursements in Form IV, including a summary statement of disbursements as Exhibit A, and
- a summary of the total fees and disbursements claimed as prescribed in Form V, and to
- serve all respondents with a copy of all the documents submitted to the CRTC

The CRTC has also said that, in the case of experts retained by cost applicants, it expects applicants to

- “to provide evidence to support the necessity of using an outside, as opposed to an in-house, analyst or consultant”, because, “[f]or instance, the applicant may demonstrate that its full participation in the proceeding required it to temporarily retain the services of an outside specialist that the applicant could not financially justify employing in-house”, and

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<sup>25</sup> *Ibid.*, at para. 13.

<sup>26</sup> *Ibid.*, at para. 13.

<sup>27</sup> *Ibid.*, at para. 22.

<sup>28</sup> *Ibid.*, at para. 32.

<sup>29</sup> *Revision of CRTC costs award practices and procedures*, Telecommunications Regulatory Policy 2010-963 (Ottawa, 23 December 2010), <http://www.crtc.gc.ca/eng/archive/2010/2010-963.htm> , at para. 12.

- “to provide objective evidence that the external consultant or analyst possesses specialized knowledge or relevant experience that bears directly on the subject matter of the proceeding”,<sup>30</sup> such as résumés and/or professional certifications<sup>31</sup>

The CRTC has also clarified that in the case of survey research, surveys must be completed before a CRTC proceeding is “already well underway”, and in any event before an applicant submits its views on the matters under consideration to the CRTC.<sup>32</sup>

Nearly all CRTC cost awards are final, rather than interim (when applicants ask for costs during a proceeding, rather than at the end of it). Applicants for interim costs bear the burden of demonstrating that they lack “sufficient financial resources to continue participating effectively in the proceeding without an interim costs award”.<sup>33</sup> Subsection 63(c) of the Rules of Procedure requires the Commission to consider whether an applicant for interim costs has “sufficient financial resources to participate effectively in the proceeding.”

Costs applications must be filed within 30 days of the end of the record (when final representations are due) in telecommunications proceeding.<sup>34</sup>

Besides its 2010 policy the CRTC also issues other documents relevant to the applications process. For example, it occasionally issues ‘information bulletins’ in both telecommunications and broadcasting to clarify its approach in different areas – the most recent awards-process bulletin was issued in 2016.<sup>35</sup> It also often sets out hints about its decision-making approach in the costs orders and decisions about costs orders that it issues.<sup>36</sup> In Cost Order 2016-185, for example, the CRTC denied an application for costs, pointing out that the applicant’s submissions lacked evidence. It said these

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<sup>30</sup> *Determination of final costs award with respect to the participation of the DiversityCanada Foundation in the Telecom Notice of Consultation 2013-337 proceeding*, Telecom Cost Order 2015-130 (Ottawa, 9 April 2015), <http://www.crtc.gc.ca/eng/archive/2015/2015-130.htm>.

<sup>31</sup> *Determination of costs award with respect to the participation of the DiversityCanada Foundation in the proceeding leading to Telecom Decision 2015-131*, Telecom Order 2015-132 (Ottawa, 9 April 2015), <https://www.crtc.gc.ca/eng/archive/2015/2015-132.htm>.

<sup>32</sup> *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 Cost Order 2017-362 (Ottawa, 16 October 2017), <http://www.crtc.gc.ca/eng/archive/2017/2017-362.htm>, at para. 23.

<sup>33</sup> *Determination of interim costs award with respect to the participation of the Affordable Access Coalition in the proceeding initiated by Telecom Notice of Consultation 2015-134 concerning the Commission’s review of basic telecommunications services*, Telecom Order CRTC 2016-132 (Ottawa, 13 April 2016), <http://www.crtc.gc.ca/eng/archive/2016/2016-132.htm>.

<sup>34</sup> *CRTC Rules of Practice and Procedure*, SOR/2010-277, <http://laws.justice.gc.ca/eng/regulations/SOR-2010-277/index.html>, s. 65: “An application for final costs must be filed no later than 30 days after the day fixed by the Commission for the filing of final representations with it.”

<sup>35</sup> *Guidance for costs award applicants regarding representation of a group or a class of subscribers*, Telecom Information Bulletin CRTC 2016-188 (Ottawa, 17 May 2016), <http://www.crtc.gc.ca/eng/archive/2016/2016-188.htm>.

<sup>36</sup> For the past several years the CRTC has used the phrase, “Determination of costs award” in these costs orders.

... were bereft of any value to the Commission in its decision making. For instance, these submissions contained both bald assertions, made without providing evidentiary support, and irrelevant authorities, ostensibly cited in support of untenable positions.

Respondents (the telecommunications companies that may be liable for costs) have the right to answer a cost applicant's application within 10 days after the day the application is filed.<sup>37</sup> Applicants respond to these answers from time to time; the costs-application process does not expressly provide for the costs incurred in these responses to be included in the initial costs application.

The CRTC then renders a decision on costs applications.

The CRTC has not published any guidance describing the time it will take to issue determinations on costs applications. In 2016, in denying an interim costs application in 2016, however, the CRTC told the applicant (and others reading the decision) that it intended "to dispose of final costs applications prior to the release of its decision flowing from the proceeding ... to minimize the time that applicants would need to wait" to receive final costs, given the proceeding's length and complexity.<sup>38</sup>

#### **IV. Cost orders issued by the CRTC from 2013 to November 2017**

##### **A. Research method**

The central question for this research note is whether the time taken by the CRTC to issue costs orders has changed.

To answer this question the Forum collected information from the CRTC's search engine about CRTC costs orders issued from January 1, 2013, to November 10, 2017. The following data were collected about each order:

- Date on which order was issued
- The applicant's name
- The date of the application
- Number of parties that commented adversely on the application<sup>39</sup>
- The proceeding in relation to which costs were being sought and a brief description of the proceeding<sup>40</sup>
- The date on which the proceeding began (the date on which an application was filed, the date of a public notice)
- The type of proceeding – whether a CRTC policy proceeding, or one triggered by an application

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<sup>37</sup> S. 67.

<sup>38</sup> *Determination of interim costs award with respect to the participation of the Affordable Access Coalition in the proceeding initiated by Telecom Notice of Consultation 2015-134 concerning the Commission's review of basic telecommunications services*, Telecom Order CRTC 2016-132 (Ottawa, 13 April 2016), <http://www.crtc.gc.ca/eng/archive/2016/2016-132.htm>.

<sup>39</sup> In some cases parties submitted comments that either supported the application, or made submissions solely as to the parties that should pay the order; as they did not bear directly on the substance of the CRTC's decision to grant or deny cost applications, these comments were not included in the analysis.

<sup>40</sup> E.g., 'Wireless Code', 'Last payphone'.



- The date on which the proceeding's record closed for public-interest participants<sup>41</sup> (i.e., the deadline for interventions, for final argument, or for final reply by the public or public-interest organizations)
- The CRTC determination resulting from the proceeding<sup>42</sup>
- The date of the CRTC determination
- The amount of costs that the party applied for, and the
- The amount of costs granted by the CRTC's cost order (if any)

### **B. Data**

The Forum identified 135 cost orders issued by the CRTC from 1 January 2013, to 10 November 2017, and published on the CRTC's website:

2013-2017: 135 CRTC cost orders				
2013	2014	2015	2016	2017
2013-119	2014-220	2015-129	2016-137	2017-125
2013-185	2014-242	2015-130	2016-138	2017-126
2013-245	2014-243	2015-132	2016-153	2017-127
2013-281	2014-244	2015-160	2016-154	2017-128
2013-323	2014-245	2015-161	2016-155	2017-129
2013-520	2014-246	2015-19	2016-156	2017-130
2013-521	2014-247	2015-194	2016-157	2017-131
2013-522	2014-248	2015-213	2016-158	2017-137
2013-523	2014-308	2015-240	2016-185	2017-163
2013-524	2014-309	2015-252	2016-186	2017-164
2013-525	2014-350	2015-264	2016-19	2017-165
2013-526	2014-351	2015-265	2016-203	2017-18
2013-569	2014-366	2015-340	2016-210	2017-25
2013-679	2014-407	2015-341	2016-221	2017-276
2013-724	2014-408	2015-342	2016-222	2017-277
2013-725	2014-409	2015-358	2016-254	2017-362
2013-726	2014-428	2015-393	2016-255	2017-363
2013-727	2014-433	2015-441	2016-256	2017-364
2013-728	2014-437	2015-442	2016-257	2017-374
2013-729	2014-439	2015-460	2016-309	2017-375
2013-730	2014-443	2015-463	2016-325	2017-376
2013-731	2014-494	2015-464	2016-361	2017-378
2013-732	2014-495	2015-510	2016-362	2017-379
	2014-496	2015-511	2016-369	2017-380
	2014-512	2015-512	2016-371	2017-403
	2014-548	2015-565	2016-378	2017-95
	2014-559	2015-566	2016-411	
	2014-560	2015-567	2016-413	
23 cost orders	28 cost orders	28 cost orders	30 cost orders	26 cost orders

The costs orders were sought with respect to 71 different CRTC telecommunications proceedings:

<sup>41</sup> Meaning that costs for any work beyond that date on the proceeding could not be sought.

<sup>42</sup> Regulatory Policy, Decision, Order or other document issued by the CRTC.

Number of costs orders, by proceeding						
Proceeding	Year					Total: 2013-17
	2013	2014	2015	2016	2017	
2011-348	1					1
2012-0046-9	2					2
2012-557	7					7
2012-669	1					1
2013-140	1					1
2013-155		7				7
2013-337		1	2			3
2013-338		4				4
2013-527		1				1
2013-549		1				1
2013-551			3			3
2013-685		1				1
2014-1056-3			1			1
2014-188			1			1
2014-44			2			2
2014-76			2			2
2015-134				2	11	13
2015-239				7	1	8
2015-305				1		1
2015-548				1		1
2015-554				1		1
2015-66			2			2
2015-67			2			2
2016-103					1	1
2016-115					1	1
2016-192				2	3	5
2016-256				1		1
2016-293					8	8
2016-431					1	1
8620-J64-201215989	1					1
8620-P8-201405606			1			1
8622-B75-201513945				1		1
8622-P8-201400142, 00134		1				1
8622-Q15-201310508	2					2
8622-Q15-20131050812	1					1
8633-R28-201310320	3					3
8633-R28-201501586			1	1		2
8633-T66-201310812	2					2
8633-T66-201401827		1				1
8638-S22-201310515	1					1
8650-P8-201215913		1				1
8661-B54-201408930			1			1
8661-N1-201207720	1					1
8661-N1-201413137			1			1
8661-P8-201314012		1				1
8661-T69-201507287				1		1
8662-B2-201512161				1		1
8662-B54201305178		1				1
8662-C182-201508235				2		2
8662-D53-201312321		1				1
8662-D53-201407536			1			1
8662-D53-201509077				1		1
8662-D53-201510371				1		1

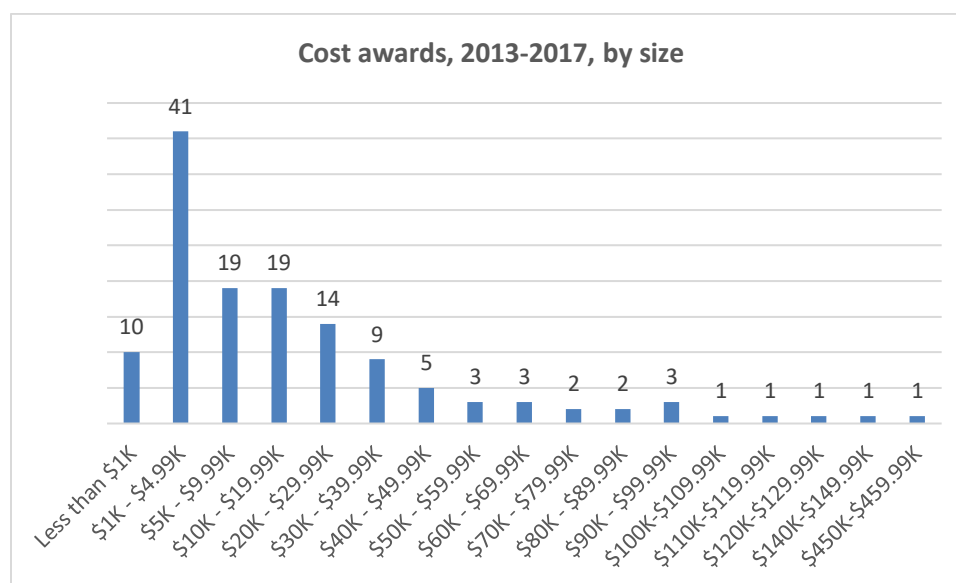
Number of costs orders, by proceeding						
Proceeding	Year					Total: 2013-17
	2013	2014	2015	2016	2017	
8662-N1-201401091		1				1
8662-N1-201505629				1		1
8662-R28-201411694			1			1
8663-B2-201514050				1		1
8663-N1-201401406			1			1
8663-S119-201500645			1			1
8663-T117-201513325				1		1
8665-B2-201413343			3			3
8665-B38-201306829		1				1
8665-D53-201406877			1			1
8665-E17-201312389		2				2
8665-P8-201400762			1			1
8665-T66-201507667				1		1
8678-T66-201306845		1				1
8678-T66-201402891		1				1
8698-P8-201505992				1		1
8698-T66-201503996				2		2
8620-P8-201400845		1				1
<b>Number of orders</b>	23	28	28	30	26	135
<b>Total proceedings</b>	12	18	19	20	7	71

From 2013 to November 2017 23 individuals or organizations applied for costs in telecommunications proceedings: three individuals, and twenty organizations.

Cost orders by applicant and year						
Applicants	2013	2014	2015	2016	2017	Total
<b>Individuals</b>						
Bradley Nickel					1	1
J-F Mezei	1					1
Ryan Adams					2	2
<i>Subtotal, 3 individuals</i>	1				3	4
<b>Public interest organizations</b>						
<i>Focus - accessibility</i>						
BC Video Relay Services Committee		1				1
Canadian Association of the Deaf		1			1	2
Canadian Hearing Society		1			1	2
Deaf Wireless Canada					2	2
Toronto Association of the deaf		1				1
CNIB			1		1	2
Media Access Canada	1		1	2	3	7
Ontario Video Relay Service Committee		1	1			2
Neil Squire Society		1	1			2
McLaughlin Educational Consulting Services		1				1
Sonny Access Consulting		1				1
<i>Subtotal, 11 accessibility organizations</i>	1	8	4	2	8	23
<i>Focus – Internet</i>						
CIPPIC et al	4			3	1	8
OpenMedia.ca			1	2	2	5
<i>Subtotal – 2 Internet organizations</i>	4		1	5	3	13
<i>Focus – underserved areas</i>						
First Mile Connectivity Consortium			1		1	2

Cost orders by applicant and year						
Applicants	2013	2014	2015	2016	2017	Total
Manitoba Keewatinowi Okimakanak					1	1
<i>Subtotal – 2 underserved areas organizations</i>			1		2	3
<i>Focus – disadvantaged</i>						
Diversity Canada et al	1	3	3	2		9
<i>Focus – general public interest</i>						
FRPC				1	2	3
<i>Focus - consumers</i>						
Consumers Council of Canada	2	1		1	1	5
PIAC et al	10	15	13	17	4	59
Union des consommateurs	4	1	6	2	3	16
<i>Subtotal – 3 consumers organizations</i>	16	17	16	20	8	80
<b>Total</b>	<b>23</b>	<b>28</b>	<b>28</b>	<b>30</b>	<b>26</b>	<b>135</b>

The average amount sought by applicants across all 135 costs orders was \$24,586 – but in over a third of the orders (51, or 37.8%) applicants sought less than \$5,000; just over half of the applications (70, or 51.9%) were for less than \$10,000.



### C. Results from analysis of data

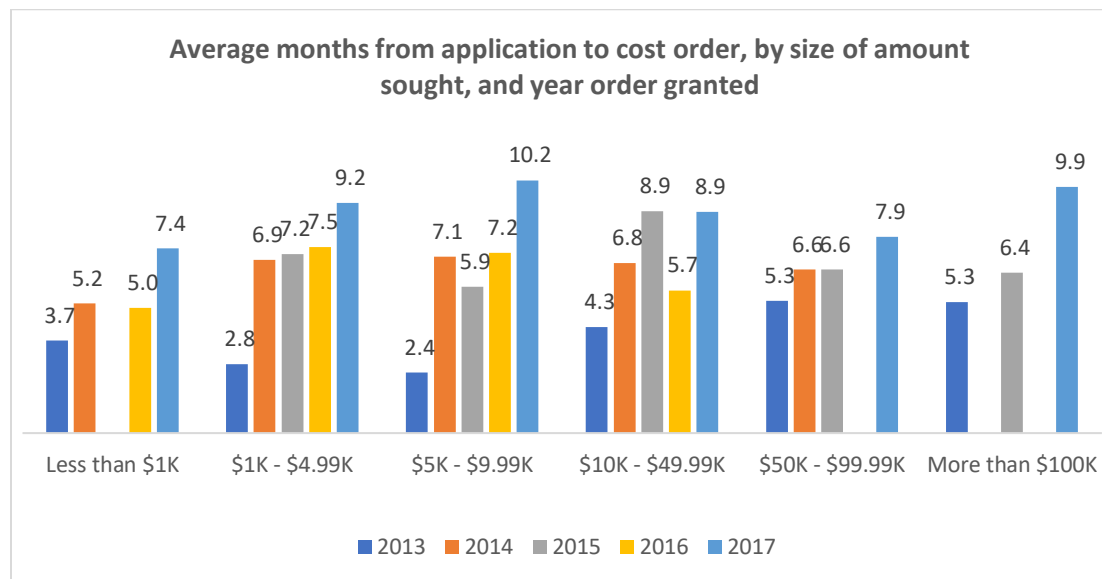
As noted above, the central question for this research note is whether the time taken by the CRTC to issue costs orders has changed – and the answer is that the time taken by the CRTC to issue costs orders has more than doubled from an average of 3.7 months after applications were filed in 2013, to 8.6 months after filing in 2017.

Average number of months to CRTC's issuance of cost orders					
Orders and reference dates	2013	2014	2015	2016	2017**
Number of orders	23	28	28	30	26
Number of proceedings	12	18	19	20	7

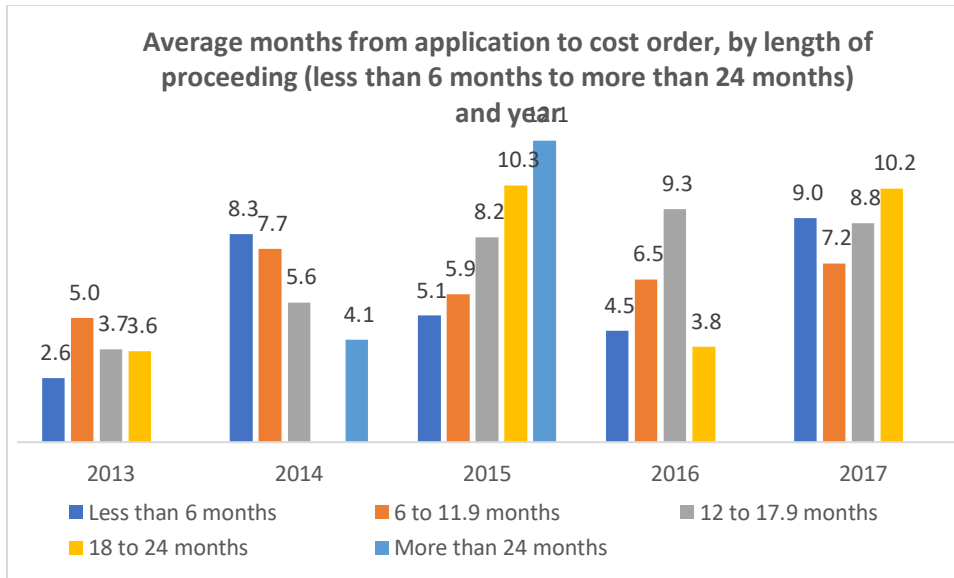
Months from launch of proceeding	9.5	12.2	13.2	10.6	18.8
Months from end of proceeding record*	5.3	8.3	8.0	5.0	9.4
Months from date of CRTC outcome in proceeding	1.5	1.6	-0.5	0.8	4.6
<b>Months from date that cost application is filed</b>	<b>3.7</b>	<b>6.9</b>	<b>7.6</b>	<b>6.6</b>	<b>8.6</b>
* Being the deadline for public organizations to make their last submission in a proceeding					
** January 1 <sup>st</sup> to November 10 <sup>th</sup> 2017					

The data also show that the time taken by the CRTC to issue cost orders once it has issued its decision in a proceeding more than trebled between 2013 and 2017. In 2013 the CRTC issued costs orders on average 1.5 months – roughly 45 days – after the end of proceedings; in 2017 it issued the orders on average 4.6 months – 138 days – after the end of proceedings.

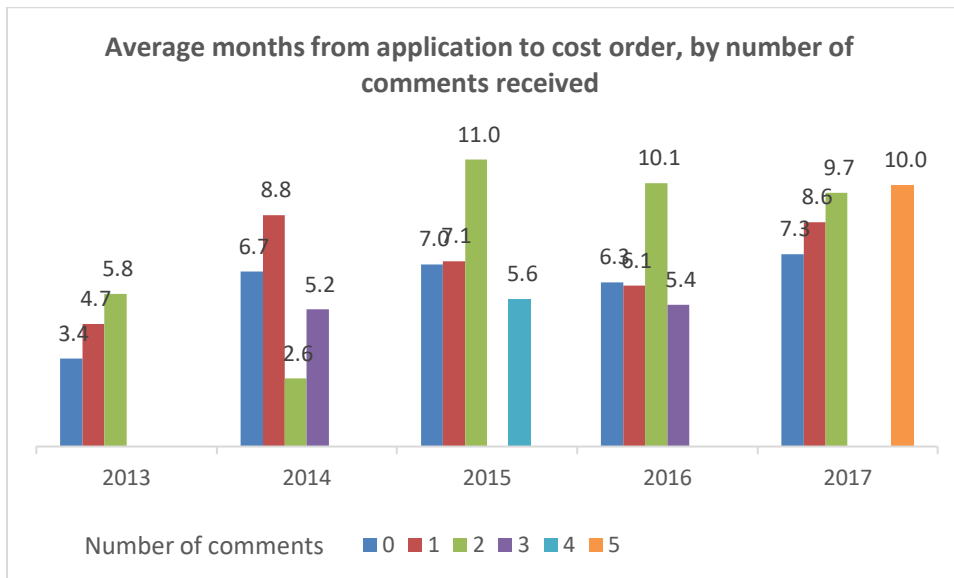
The CRTC’s costs orders do not address (and therefore do not explain) the time taken by the CRTC to issue the orders. The size of the amount sought by applicants does not appear to be related to the time that the CRTC takes to issue an order because (as shown in the following chart), it took longer to issue orders in 2017 than in other years, regardless of the size of the order. For example, cost orders in which applications sought less than \$1,000 took an average of 3.7 months to be issued in 2013, and 7.4 months in 2017.



There was also no direct relationship between the length of a proceeding and the time taken by the CRTC to issue a cost order. In 2014 and 2016 the time taken to issue cost orders decreased as the length of the proceeding increased; in 2013, 2015 and 2017 the time taken to issue the orders increased as the length of the proceeding increased.



There is also no direct relationship between the number of parties submitting comments on a cost application, and the time taken by the CRTC to issue its order. In 2013 and 2017 the CRTC issued orders for applications that received no comments more quickly than applications that attracted one or more comments; in the remaining years the orders were issued more quickly when applications attracted three or more comments, than when applications attracted no comments.



## V. Conclusions, implications and recommendations

### A. Conclusions

This research note considered whether the time taken for the CRTC to issue costs orders to public-interest groups under section 56 of the *Telecommunications Act* has changed, and found that this time has more than doubled since 2013.

From 2013 to November 10, 2017 the time between the filing of costs applications and the CRTC's publication of costs orders increased by 130% - from an average of 3.7 months in 2013, to an average of 8.6 months in 2017. (The number of costs orders also increased in this period, by 13% - from 23 in 2013, to 26 in 2017.)

It should be noted, however, that the average times between cost order applications and decisions may in fact be longer than described here: the data for this research only describe applications that have been granted – not applications that were filed in the 2013-2017 time frame, but have not yet been the subject of a costs order.

Based on the data collected from the CRTC's costs orders from 2013 to 2017, the CRTC also appears to have changed its informal decision of 2016, "to dispose of final costs applications prior to the release of its decision flowing from the proceeding ....":<sup>43</sup> in 2016 the CRTC issued costs orders on average less than a month (0.8 months) after issuing its determinations in proceedings; in 2017 it issued the orders 4.6 months later.

### B. Implications

A relatively small number of public interest groups currently participates in CRTC proceedings. A process in which the CRTC issues cost orders three-quarters of a year after applicants submit their statements of costs, constrains public-interest organizations' capacity to meet their financial obligations in a timely manner, and limits their ability to retain outside experts who also require timely payment of their bills. Public-interest organizations such as PIAC have already said that the lengthy cost-order process of the CRTC means that it can no longer afford to participate in the CRTC's telecommunications proceedings.

As the CRTC has not issued any recent public statements about its approach to implementing section 56 of the *Telecommunications Act*, conclusions about the CRTC's approach to the costs-order process, beyond the empirical fact that it is taking longer to issue these orders, would be speculative. Similarly, it would be speculative to conclude – merely because the CRTC is taking significantly longer to issue costs orders – that the CRTC no longer considers active, informed participation by public-interest organizations in its proceedings to be desirable, that it no longer considers it necessary for the public to benefit from organizations that develop and maintain expertise in telecommunications matters,<sup>44</sup> or

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<sup>43</sup> *Determination of interim costs award with respect to the participation of the Affordable Access Coalition in the proceeding initiated by Telecom Notice of Consultation 2015-134 concerning the Commission's review of basic telecommunications services*, Telecom Order CRTC 2016-132 (Ottawa, 13 April 2016), <http://www.crtc.gc.ca/eng/archive/2016/2016-132.htm>.

<sup>44</sup> Telecom Decision CRTC 81-5 (Ottawa, 9 March 1981):

that the telecommunications issues coming before the Commission are no longer sufficiently complex or important as to warrant the existence of public-interest organizations with regulatory expertise in this sector.<sup>45</sup>

That said, the withdrawal from CRTC proceedings by public-interest organizations due to the absence of reasonably timely cost orders would fundamentally change the CRTC's performance of its duties under its enabling statutes.

First, assuming that the general public will intervene in the same matters in which public-interest organizations would have intervened, it is unlikely that many members of the public will participate in all stages of such proceedings, or meet the requirements of each procedural change. Not every proceeding is complex – but those that affect Canadians' daily lives often are. When the CRTC set out in 2012 to establish the *Wireless Code*, for example, its initial telecommunications consultation notice was amended or supplemented four times in four months;<sup>46</sup> when it considered the renewal applications of Canada's largest television ownership groups, its initial broadcasting consultation notice was revised seven times over seven months.<sup>47</sup> Effective and responsible public participation generally requires interested parties to monitor these proceedings, track the evidence being presented, observe procedural changes, and to adjust their participation accordingly. The loss of public-interest organizations with expertise and experience with the CRTC's telecommunications proceedings may well mean that, at the end of a CRTC proceeding, the only remaining parties will be the CRTC and those it regulates.

Second, even if one assumes that the general public would intervene in the same (if not more) matters in which public-interest organizations have until now intervened, it is unclear whether many of these interventions will submit the evidence on which the CRTC may make a decision: professional surveys, economic analyses, and legal opinion. The result may well be that, at the end of a CRTC proceeding, the CRTC would have to weigh the detailed and extensive evidence submitted by Canada's communications

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... the active participation of established organizations such as CAC and NAPO et al in regulatory proceedings is desirable in view of their continuing interest and knowledge base in the field. In the Commission's view, the adoption of Bell's argument concerning double recovery would in effect mean that only ad hoc organizations could expect to obtain awards of costs from the Commission. Such organizations would not likely have the base for informed participation upon which established organizations such as CAC and NAPO et al can build their specific interventions.

<sup>45</sup> *CRTC Procedures and Practices in Telecommunications Regulation*, Telecom Decision CRTC 78-4, (Ottawa, May 1978):

The complexity and importance of the issues which come before the Commission often demand that expert resources be available for their adequate treatment. Such resources are employed by the regulated companies. In the Commission's view, it is critical to, and part of the necessary cost of, the regulatory process that such resources also be available to responsible representative interveners.

<sup>46</sup> Telecom Notice of Consultation CRTC 2012-557 (Ottawa, 11 October 2012) was amended by Telecom Notices of Consultation CRTC 2012-557-1 (Ottawa, 1 November 2012); 2012-557-2 (Ottawa, 21 December 2012); 2012-557-3 (Ottawa, 28 January 2013); and 2012-557-4 (Ottawa, 11 February 2013).

<sup>47</sup> Broadcasting Notice of consultation 2016-225 (Ottawa, 15 June 2016) was amended by 2016-225-1 (Ottawa, 28 June 2016); 2016-225-2 (Ottawa, 24 August 2016) ; 2016-225-3 (Ottawa, 2 November 2016); 2016-225-4 (Ottawa, 24 November 2016); 2016-225-5 (Ottawa, 1 December 2016); 2016-225-6 (Ottawa, 15 December 2016) ; 2016-225-7 (Ottawa, 6 January 2016).



companies on a wide range of issues, against ... non-existent evidence from the public. This could in turn have two effects.

In the short term, the absence of public-interest evidence may lead the CRTC to issue decisions that – because they would be based primarily on private-sector evidence – give less weight to the public interest. After all, the *Telecommunications Act* does not expressly require the CRTC to place the public interest first in its decisions;<sup>48</sup> and the 2006 order by the current government's predecessor which requires the CRTC to "rely on market forces to the maximum extent feasible" to achieve Canada's telecommunications' policy<sup>49</sup> remains in effect 11 years later. Canadians may only experience the effects of such decisions when they are required to pay more for their telecommunications services, or receive services of lower quality than in the past – likely well past the statutory limits for appeals to either the Federal Court of Appeal or Cabinet.<sup>50</sup> Presumably general members of the public would then apply to the CRTC for relief, either using the CRTC's procedures<sup>51</sup> or informal means such as public comment campaigns.<sup>52</sup> In either case, the time and commitment required from members of the public may make such involvement rare.

In the longer term, the absence of public-interest evidence from the record of a CRTC proceeding may also change the law on Canadians telecommunications, due to the difficulties in challenging decisions that do not serve the public interest. Those challenging such decisions would likely have to convince a court that even if a CRTC decision met the provisions of the 2006 *Order*, it was still unlawful. Supposing that this hurdle were met, the second hurdle would be to convince a court that it should set aside a CRTC decision because the CRTC failed to consider public-interest evidence. Yet the courts have held that the CRTC may consider evidence from past proceedings,<sup>53</sup> even if it considered no public-interest

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<sup>48</sup> The *Telecommunications Act's* only express references to the "public interest" are in sections 39(4)(a) and 39(5)(a) (disclosure of information submitted in proceedings if in the public interest), and section 53 (assignment by the Minister of Justice of a lawyer to intervene in a CRTC proceeding if an issue of particular importance affecting the public interest is in issue).

<sup>49</sup> *Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunication Policy Objectives*, Order in Council P.C. 2006-1534 SOR/2006-355 (14 December 2006).

<sup>50</sup> S.12(1) of the *Telecommunications Act* requires petitions of CRTC decisions to be presented within 90 days after the decision; s. 64(2) requires leave to appeal CRTC decisions to be sought from the Federal Court of Appeal within 30 days after the decision date; federal court challenges to be

<sup>51</sup> *CRTC Rules of Practice and Procedure*, SOR/2010-277, <http://laws.justice.gc.ca/eng/regulations/SOR-2010-277/index.html>, Parts 1 and 4.

<sup>52</sup> Such as online campaigns to encourage the government to order the CRTC to change direction. See e.g. "MPs rake CRTC chairman over Internet-billing coals", *Globe and Mail* (3 February 2011; last updated 10 September 2012), <https://www.theglobeandmail.com/news/politics/ottawa-notebook/mps-rake-crtc-chairman-over-internet-billing-coals/article1893183/?from=1892522>:

The Harper government plans to overturn a CRTC decision that effectively ends "unlimited use" Internet plans if the regulator doesn't rescind it itself.

Industry Minister Tony Clement made the surprise announcement late Wednesday night via Twitter after a massive consumer backlash and criticism from political opponents who fear the decision makes Canada a "digital backwater."

<sup>53</sup> *Bell Canada v. 7262591 Canada Ltd. (Gusto TV)*, 2016 FCA 123, at paras. 14 and 15:

But some administrative decision-makers, like the CRTC in this case, operate in an ongoing regulatory context where multiple issues, often more general and polycentric, interrelate and evolve over time. Administrative decision-makers such as these continually see many of the same parties on issues that relate to or intersect with past issues. In making decisions, these administrative decision-makers will focus on evidence placed before them in the specific matter but,

evidence in a current telecommunications decision (because none was submitted), therefore, the CRTC could arguably recite such evidence from past decisions and immunize its decision from appeal. Then, even if it could be demonstrated that the CRTC had ignored public-interest evidence from the past, public-interest organizations would have to make a very strong case for a court to admit and review new public-interest evidence: courts are not fact-finding bodies, and may only admit evidence not on the record of a tribunal's proceeding in exceptional circumstances.<sup>54</sup> Ongoing failures of public-interest court challenges of the CRTC might serve to discourage new public-interest challenges – leaving decisions that do not serve the public interest intact.

Yet what is not clear is whether the gradual elimination of public-interest groups from the CRTC's proceedings is consistent with Parliament's telecommunications policy for Canada. Having provided for a costs awards in the *Telecommunications Act*, did Parliament foresee that the CRTC might at some point limit public participation through a costs-order process in which the CRTC issues its decisions about costs applications 8 months after receiving them? What should we understand by Parliament's failure to address the timing of costs order in section 73 of the *Telecommunications Act* – that Parliament was indifferent to the timing, or that it assumed the CRTC would behave reasonably?

### C. Recommendations

The CRTC has set out service objectives for applications filed by broadcasting and telecommunications companies,<sup>55</sup> and in 2016 set out initiatives in its telecommunications processes to “increase the efficiency of the Commission's approval processes, provide greater clarity to the industry, and ensure that the Commission's tariff application and intercarrier agreement approval processes remain as minimally intrusive and as minimally onerous as possible.”

The CRTC has not, however, set out similar service objectives for its costs-order process – nor has it explained the absence of such objectives.

While the CRTC is an independent agency operating at arms-length from the government, the Forum submits that it would be reasonable to assume that, as a federal agency, the Commission adheres to the Federal government's overall policy regarding the payment of invoices. Under that policy the federal

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subject to any obligations of procedural fairness and disclosure owed to the particular parties before them, they may go further and draw upon broader industrial, economic, regulatory or technological insights they have gathered from past proceedings and regulatory experience.

In those circumstances, past proceedings and regulatory experience can form part of the data the administrative decision-maker can draw upon in making a decision. Accordingly, parts of that data, identified by the parties as matters that the administrative decision-maker drew upon in making its decision, can form part of the evidentiary record before the reviewing court. The inclusion of that data in the reviewing court's record can often be useful in assessing reasonableness: a decision at odds with past proceedings and regulatory experience might be suspect, while one that is consistent with past proceedings and regulatory experience might be more likely to be found acceptable and defensible

<sup>54</sup> See e.g. *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras. 19 and 20.

<sup>55</sup> *New service objectives for the processing of broadcasting and telecommunications applications as of 1 April 2011*, Broadcasting and Telecom Information Bulletin CRTC 2011-222 (Ottawa, 1 April 2011), <http://www.crtc.gc.ca/eng/archive/2011/2011-222.htm>

government pays invoices “within 30 days, from the time ‘an invoice is received or the goods or services are accepted, whichever is later’”, unless there are questions or issues about the invoice.<sup>56</sup>

The CRTC receives the organizations’ invoices within 30 days of the chose of record of the proceeding, and arguably ‘accepts’ their services after considering any comments it has received about an application, which must be received “within 10 days after the day on which the application for final costs is filed”.<sup>57</sup> To comply with the Federal government’s invoice-payment policy, therefore, the CRTC should commit to issuing costs orders within 30 days of the receipt of comments about a specific costs application.

Of course, even when the CRTC issues a costs order, the parties required to remit payment to public-interest organizations may take several weeks to send their payments to the applicants. To the extent that organizations take more than a reasonable amount of time to remit these payments, the CRTC could incorporate the Federal government’s provisions with respect to interest payments. The government advises those submitting invoices that it will pay interest on amounts that are paid late, unless it notifies those filing invoices within two weeks “of a problem with the invoice, the goods or services.”<sup>58</sup> The CRTC could, presumably, include a provision for interest to be paid on amounts owing if the payment takes longer than two weeks to issue.

If participation by public-interest organizations remains important to the CRTC’s telecommunications proceedings, several steps could be taken.

In the short term, it is within the CRTC’s authority to

1. invite public-interest organizations to meet with the Commission to discuss the current costs-order process and its impact on organizations’ capacity to participate
2. provide greater clarity about its costs-award process for public-interest organizations, by publishing the criteria it uses to evaluate costs applications so as to enable applicants to ensure they meet these criteria before they incur costs to participate in a given telecommunications proceeding,
3. increase the efficiency of its costs-award process by setting a service-standard objective for the CRTC to issue its cost-order decisions within 30 days after the end of the comment period for costs applications
4. include a provision for interest to be paid in the case of costs orders that it issues beyond the 30-day time frame, and for payments made by telecommunications respondents beyond a two-week period

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<sup>56</sup> Public Works and Government Services Canada, “Getting Paid”, <https://buyandsell.gc.ca/for-businesses/selling-to-the-government-of-canada/bid-follow-up/getting-paid> (accessed 21 November 2017).

<sup>57</sup> *CRTC Rules of Practice and Procedure*, SOR/2010-277, <http://laws.justice.gc.ca/eng/regulations/SOR-2010-277/index.html>, s. 67.

<sup>58</sup> *Ibid.*

and

5. to ensure that the CRTC's costs-order process is minimally time-consuming and "as minimally onerous as possible".

In the medium term, it would also be within the CRTC's authority to introduce a new process to administer costs orders. It could initiate a public process to seek comments on expanding the mandate of the Broadcasting Participation Fund<sup>59</sup> that the CRTC established in 2011 to support public-interest organizations' participation in broadcasting proceedings (and which will run out of funding in early 2018),<sup>60</sup> and to set the parameters for the funding, governance and operation of this new 'Communications Participation Fund' (CPF). Assigning responsibility for costs awards to a CPF would benefit the CRTC by reducing its workload, enabling it to focus its attention on the implementation of its enabling statutes.

In the longer term, Parliament should clarify, through the CRTC's enabling statutes, that it bears a duty to ensure that its decisions and policies place the public interest first, and to ensure that all members of the public, including but not limited to, public-interest organizations, are both necessary and critical to fair public process in the regulation of Canadian communications companies.

Forum for Research and Policy in Communications, 22 November 2017

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<sup>59</sup> In the same way that the CRTC expanded the responsibilities of the Commissioner of Complaints for Telecommunications Services: see Review of the structure and mandate of the Commissioner for Complaints for Telecommunications Services Inc., Broadcasting and Telecom Regulatory Policy CRTC 2016-102 (Ottawa, 17 March 2016), <http://www.crtc.gc.ca/eng/archive/2016/2016-102.htm>.

<sup>60</sup> The CRTC established the BPF as a tangible benefit from BCE's acquisition of CTVglobemedia Inc. in 2011, "to assist in the representation, research and advocacy of [public interest and consumer groups]" in broadcasting matters.

The CRTC has not renewed its funding since 2011, and the BPF has posted a caution on its website that its funding will be "materially depleted by early 2018". David McKendry, Chair, on behalf of the Board of Directors of the BPF, *Caution To Potential Applications For Costs Awards*, accessed 15 November 2017, <http://www.bpf-ca/en/home.html>.