

**Representations with respect to the Order
under Section 8 of the *Telecommunications
Act* - Policy Direction to the Canadian Radio-
television and Telecommunications
Commission**

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Representations of ARCH Disability Law Centre

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Introduction

1. ARCH Disability Law Centre (ARCH) makes the following representations with respect to a proposed Order under section 8 of the *Telecommunications Act*-Policy Direction to the Canadian Radio-television and Telecommunications Commission (the Proposed Order). The Order was published in the *Canada Gazette*, Part I, Vol. 140, No. 24 on June 17, 2006.

2. ARCH has been a party in a number of proceedings before the CRTC¹ and also made substantial submissions and reply submissions to the Telecommunications Policy Review Panel. ARCH makes these representations based on the experience and knowledge we have developed in advancing the rights of persons with disabilities in the context of the delivery of telecommunications services on a non-discriminatory basis.

3. ARCH is an Ontario-based charitable, not-for-profit legal clinic that is dedicated to defending and advancing the equality rights of persons with disabilities, regardless of the nature of the disability. ARCH represents national and provincial disability organizations and individuals in test case litigation at all levels of tribunals and courts. We provide education about disability law, make submissions to government on matters of law reform and offer a telephone

¹ ARCH has been a party in the following CRTC proceedings: Application by Mrs. Marie Stark and Mr. Chris Stark to review and vary *Review of Regulatory Framework*, Telecom Decision CRTC 94-19; Telecom Public Notice CRTC 2004-1; Telecom Public Notice CRTC 2004-2; Telecom Public Notice CRTC 2005-2; Part VII Application filed by Bell Canada and SaskTel requesting the Commission to discontinue applying local service winback rules; Telecom Public Notice CRTC 2006-6; Telecom Public Notice CRTC 2006-10. ARCH has also been an active participant on the CRTC Interconnection Steering Committee (CISC) Accessibility Issues Working Group.

summary legal advice and referral service. ARCH is governed by a volunteer board of directors, a majority of whom are persons with disabilities.

The Proposed Order

4. The Proposed Order was made pursuant to section 8 of the *Telecommunications Act* (the Act) which provides that the Governor in Council may issue to the CRTC “directions of general application on broad policy matters with respect to the Canadian telecommunications policy objectives.”

5. The *Telecommunications Act* defines "Canadian telecommunications policy objectives" as “the objectives set out in section 7” of the Act.² Section 7 establishes nine policy objectives.

6. The Proposed Order is a policy direction to the CRTC relating to the interpretation and implementation of the policy objectives, and particularly those in subsections 7(c) and 7(f) of the Act. The text of these policy objectives are as follows:

(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications

(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective

7. The Proposed Order sets out principles relating to the reliance on market forces and sets out criteria that should be satisfied when it is determined that regulatory measures are required.

² Telecommunications Act, s.2(1)

8. The Regulatory Impact Analysis Statement (Analysis Statement), which accompanies the Proposed Order, and the Proposed Order itself draw heavily upon the *Final Report of the Telecommunications Policy Review Panel, 2006* (Review Panel Report).³

9. The Analysis Statement states that the purpose of the Proposed Order is to release a proposed policy direction which directs the CRTC "...to rely on market forces to the maximum extent feasible and regulate where there is still need to do so, in a manner that interferes with market forces to the minimum extent necessary."

10. The Analysis Statement specifically states that market oriented regulation is only one part of the comprehensive strategy recommended by the Review Panel, and that other issues raised by the Panel would require extensive analysis and consultations before the Government could proceed. The Order is simply an instrument that allowed timely policy guidance and change toward market-oriented regulation in advance of legislative changes that would take longer.⁴

ARCH's Submission for changes to the Proposed Order

11. ARCH submits that the Proposed Order be amended to be more consistent with the Analysis Statement and the Review Panel Report. In particular, the Proposed Order should be amended to more specifically recognize that in addition to reliance on market forces, there are times when regulation will continue to be necessary to meet other equally important policy objectives set out in the Act.

12. A policy directive cannot be used to amend the legislative objectives established by Parliament in s.7 of the Act. The Government explicitly recognized

³ Indeed, the wording of the Order is adopted from a draft policy directive proposed by the Review Panel.

⁴ Policy Impact Analysis Statement at p. 2

this principle when it stated in its Analysis Statement that the Order “does not diminish legislated objectives in the Act...”⁵

13. The Act specifically requires that the CRTC exercise its powers and perform its duties “with a view to implementing the Canadian telecommunications policy objectives”.⁶ The CRTC may even refrain from exercising certain powers or performing specific duties if it finds as a fact that doing so would be consistent with these objectives.⁷ In addition, the CRTC must exercise its powers and perform its duties “in accordance with any orders made by the Governor in Council ...”⁸ Consequently, policy objectives are a central part of the CRTC’s decision-making process.

14. The legislative objectives that specifically address the interests of Canadian consumers, including persons with disabilities, are found in ss. 7(a), 7(b) and 7(h), which state as follows:

(a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions

(b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada

(h) *to respond to the economic and social requirements of users of telecommunications services*

⁵ Policy Impact Analysis Statement at p. 2

⁶ Telecommunications Act, s.47(a)

⁷ Telecommunications Act, s.34(1)

⁸ Telecommunications Act, s.47(b)

15. The Review Panel recommended that concrete new initiatives be undertaken "...to achieve important social objectives that market forces are unlikely to achieve on their own, even as competition increases."⁹

16. Indeed, the Review Panel upon which the Government relies, found that the legislative objectives should include a stronger commitment to the goal of "*enhancing the social well-being of Canadians and the inclusiveness of Canadian society by meeting the needs of the disabled, enhancing public safety and security, protecting personal privacy and limiting public nuisance through telecommunications networks.*"¹⁰ [Emphasis added]

17. The Proposed Order does not directly address legislative objectives other than those in ss. 7(c) and 7(f) relating to reliance on market forces. It does, however, acknowledge that regulatory measures are sometimes required. It refers to other "measures designed to advance non-economic objectives" that should be implemented in a symmetrical and competitively neutral manner.¹¹

18. As this is the first time that the Governor in Council has exercised its power to issue a s.8 policy directive since the Act came into force, the CRTC could potentially interpret the Order in a manner that undermines those objectives set out in s.7 that do not directly reinforce reliance on market forces. In particular, the CRTC might conclude that the direction to rely on market forces to the maximum extent feasible overrides all other statutory objectives including ss.7(a), 7(b) and 7(h) of the Act which requires the CRTC to safeguard the social and economic fabric of Canada and respond to the economic and social requirements of telecommunication service users.

⁹ Review Panel's Report at p.2-7.

¹⁰ Review Panel's Report at pp. 3-4. See also Recommendation 2-2 at p. 2-9.

¹¹ Order, s. 1(b)(iii).

19. As noted above, the Government stated in its Analysis Statement that the Proposed Order “does not diminish legislated objectives in the Act...”¹² However, the Analysis Statement does not form part of the Order. When the Order is finalized and becomes enforceable, the Analysis Statement will not be part of it, and will only provide evidence of what the government set out to accomplish should the Order be challenged.

20. ARCH therefore submits that the Order should be amended, for greater clarity and precision, to include a statement providing that nothing in the Order diminishes, overrides or amends the legislative objectives set out in s.7 of the Act. The Order should also contain a statement explicitly recognizing that, consistent with ss. 7(a), 7(b) and 7(h), regulation may be necessary to achieve important social objectives and protect the interests of consumers and persons with disabilities, as market forces are unlikely to achieve these ends on their own.

21. This additional wording is consistent with the general legal principles discussed above, and with the intent of the Government as reflected in its Analysis Statement. This wording does not alter the meaning or legal effect of the Proposed Order, but it does add greater clarity and precision, to assist with the interpretation and implementation of a complex regulatory regime.

22. It is ARCH’s opinion that this additional wording too is consistent with the recently expressed views of telecommunications service providers and the CRTC.

23. The CRTC in Telecom Decision CRTC 2006-15 dealing with forbearance from the regulation of retail local exchange services, made statements about the interplay of market forces and various social and economic needs of users of telecommunications services, including requirements of persons with disabilities. In particular, the Commission stated, in the context of both its s.24 and s.27(2)

¹² Policy Impact Analysis Statement at p. 2

powers, that market forces may not be sufficient to protect the interests of persons with disabilities.¹³

24. The Companies (Aliant Telecom Inc., Bell Canada, Saskatchewan Telecommunications, Telebec, Societe en commandite, and TELUS Communications Inc.) in their Petition to the Governor in Council to Vary Telecom Decision CRTC 2005-28 (July 28, 2005) support the need for such regulation, and state as follows (para. 4).

“The Companies Acknowledge that there is a role for the Commission to regulate VoIP service providers in areas of important social policy such as the provision of 9-1-1 services, privacy safeguards and access to services by disabled persons. Social regulations that apply equally to all VoIP service providers are appropriate where the market alone cannot be expected to adequately address public policy objectives. Those aspects of Decision 2005-28 that deal with, for example, access by disabled persons, message relay service for hearing-impaired persons and privacy safeguards are important initiatives in this regard.”

¹³ Telecom Decision CRTC 2006-15, paras 355, 385, 459.