

Appendix B: Telecom Decision CRTC 2015-131



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DiversityCanada Foundation – Application to review and vary Telecom Order 2014-220

*The Commission **denies** an application from the DiversityCanada Foundation to review and vary Telecom Order 2014-220. The Commission considers that it properly applied the eligibility criteria for an award of costs while balancing the interests of encouraging public participation in Commission proceedings and ensuring that costs are awarded only to parties that assist the Commission in developing a better understanding of the matters considered.*

Background

1. In Telecom Order 2014-220, the Commission denied the DiversityCanada Foundation's (DiversityCanada) application for costs regarding its participation in the proceeding leading to Telecom Decision 2014-101. In that proceeding, DiversityCanada requested that the Commission review and vary Telecom Regulatory Policy 2013-271 (the Wireless Code decision) regarding the expiry of prepaid wireless service cards. In Telecom Decision 2014-101, the Commission denied the above-mentioned review and vary request.
2. Subsection 56(1) of the *Telecommunications Act* (the Act), which reads as follows, grants the Commission the discretion to award costs in telecommunications proceedings:

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.
3. In Telecom Information Bulletin 2011-214, the Commission set out the test it applies in determining whether to grant an application made pursuant to section 62 of the Act to review and vary a previous Commission decision:
 5. In order for the Commission to exercise its discretion pursuant to section 62 of the Act, applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, for example due to
 - an error in law or in fact;
 - a fundamental change in circumstances or facts since the decision;

- a failure to consider a basic principle which had been raised in the original proceeding; or
 - a new principle which has arisen as a result of the decision.
4. The criteria for an award of costs are set out in section 68 of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (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.

Application

5. The Commission received an application from DiversityCanada, dated 1 August 2014, in which DiversityCanada requested that the Commission review and vary Telecom Order 2014-220.
6. DiversityCanada submitted that there is substantial doubt as to the correctness of the Commission's determination in Telecom Order 2014-220 to deny costs to DiversityCanada because it had not met the criteria for an award of costs. DiversityCanada requested that the Commission vary its determination and award DiversityCanada the costs it had claimed with respect to its application to review and vary the Wireless Code decision regarding the expiry of prepaid wireless service cards.

Interventions

7. The Commission received interventions opposing DiversityCanada's application from the Canadian Wireless Telecommunications Association (CWTA), Rogers Communications Partnership (RCP), and TELUS Communications Company (TCC).
8. The CWTA submitted that DiversityCanada's application is based on a misinterpretation of the Commission's determinations in Telecom Order 2014-220. The CWTA and TCC argued that the Act and the Rules of Procedure require that the Commission evaluate every application for costs based on its merits. They added that the Commission properly exercised its discretion in determining, in Telecom Decision 2014-101, that DiversityCanada had raised no genuine issue for the

Commission's consideration in its application to review and vary the Wireless Code decision.

9. The CWTA and TCC stated that DiversityCanada had failed to assist the Commission in developing a better understanding of the matters that were considered, which resulted in the Commission's denial of DiversityCanada's costs application, as set out in Telecom Order 2014-220. TCC argued that any alleged errors made in the Wireless Code decision are irrelevant to the present application.
10. RCP indicated that it opposed DiversityCanada's current application for the same reasons set out by the CWTA.

Reply

11. In reply, DiversityCanada argued that the Commission did not properly apply the eligibility criteria for an award of costs, and that the factual findings in the Wireless Code decision and in Telecom Decision 2014-101 did play a part in the Commission's decision to deny costs to DiversityCanada in Telecom Order 2014-220.
12. DiversityCanada also argued that failure to grant its application could have a chilling effect on future public participation in Commission proceedings.

Issues

13. The Commission has identified the following issues to be addressed in this decision:
 - Did the Commission err in its denial of DiversityCanada's application for costs as set out in Telecom Order 2014-220?
 - Did the Commission err in its interpretation of its authority to award costs?

Did the Commission err in its denial of DiversityCanada's application for costs as set out in Telecom Order 2014-220?

14. DiversityCanada argued that Telecom Order 2014-220 is based on erroneous findings of fact. In particular, DiversityCanada submitted that the Commission based its decision not to award costs, set out in Telecom Order 2014-220, on its findings of fact in the proceedings leading to the Wireless Code decision and to Telecom Decision 2014-101.

Commission's analysis and determinations

15. The Commission considers that there is no merit to DiversityCanada's contention that the Commission based its denial of costs on the fact that it denied DiversityCanada's review and vary application in Telecom Decision 2014-101. As stated in Telecom Order 2014-220, costs applications are treated on their merits, regardless of the outcome of the proceeding for which the costs are sought.

16. The criteria for an award of costs set out in section 68 of the Rules of Procedure are subjective, and it is the Commission's role to determine whether, in a given case, an applicant has satisfied them. The criteria are also cumulative; thus, if the Commission determines that an applicant fails to meet any one criterion, the applicant is no longer eligible for costs.
17. The Commission considers that, in DiversityCanada's application to review and vary the Wireless Code decision, DiversityCanada did not provide any argument of merit to support its position. This means that DiversityCanada did not meet the eligibility criterion of contributing to a better understanding by the Commission of the issues under consideration. The key issue under consideration was whether there were serious arguments in favour of DiversityCanada's application to review and vary the Wireless Code decision.
18. Since DiversityCanada failed to meet this criterion, the Commission determined that DiversityCanada would not be awarded any costs, and there was no need for the Commission to consider the criterion set out in paragraph 68(c) of the Rules of Procedure.
19. The proper and only forum in which to raise allegations of erroneous findings of fact in the Wireless Code decision is an application to review and vary that decision. DiversityCanada did file such an application, which the Commission denied for the reasons set out in Telecom Decision 2014-101. The Commission considers that it provided sufficient reasons in the Wireless Code decision for not adopting DiversityCanada's view that prepaid minutes on wireless service amounts not be allowed to expire. The Commission also considers that the erroneous findings of fact alleged by DiversityCanada are based to a large extent on its misinterpretation of the Wireless Code decision.
20. In light of the above, the Commission finds that it did not err in its denial of DiversityCanada's application for costs as set out in Telecom Order 2014-220.

Did the Commission err in its interpretation of its authority to award costs?

21. DiversityCanada submitted that it is an error in law for an administrative tribunal to interpret its authority to award costs in a way that discourages public participation in its proceedings. In support of this position, DiversityCanada cited *Kelly v. Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19, in which the Alberta Court of Appeal overturned a decision by the Alberta Energy Resources Conservation Board not to award costs to an intervener in the Board's proceedings. DiversityCanada argued that the Alberta Court of Appeal's reasoning is applicable in the present case.

Commission's analysis and determinations

22. The Commission agrees that the purpose of costs awards granted by administrative tribunals is to encourage public participation in their proceedings. However, the Supreme Court of Canada has held that, in the Commission's case, this power is

similar to the power of a court to award legal costs (see *Bell Canada v. Consumers' Association of Canada et al.*, [1986] 1 S.C.R. 190).

23. The decision cited by DiversityCanada deals with a provincial administrative tribunal operating pursuant to its enabling provincial statute. As such, the Commission considers that the cited decision is of very little assistance in the present case.
24. The Commission also considers that the section 68 criteria serve to balance the interests of encouraging public participation in Commission proceedings and ensuring that costs are awarded only to parties that assist the Commission in developing a better understanding of the matters considered. The Commission therefore considers that it properly applied the section 68 criteria in its determinations in Telecom Order 2014-220.
25. In light of the above, the Commission finds that DiversityCanada has not established that the Commission erred in law in its interpretation of its authority to award costs.

Conclusion

26. The Commission finds that DiversityCanada added no new substantive elements to the Commission's deliberations in its factual submissions
 - in the review and vary proceeding that led to Telecom Decision 2014-101;
 - in the proceeding that led to Telecom Order 2014-220; and
 - in the present review and vary proceeding.
27. Accordingly, the Commission finds that DiversityCanada has failed to demonstrate substantial doubt as to the correctness of the Commission's denial of costs set out in Telecom Order 2014-220, and that there is therefore no basis on which to grant the costs claimed by DiversityCanada. The Commission therefore **denies** DiversityCanada's application to review and vary Telecom Order 2014-220.

Application for costs

28. The Commission notes that by letter dated 14 December 2014, DiversityCanada filed a separate application for costs for its participation in this proceeding. The Commission will consider DiversityCanada's request for a costs award separately, in the context of that application.

Secretary General

Related documents

- *Determination of costs award with respect to the participation of the DiversityCanada Foundation in the proceeding initiated by the Foundation's*

application to review and vary Telecom Regulatory Policy 2013-271, Telecom Order CRTC 2014-220, 8 May 2014

- *Wireless Code – Request by DiversityCanada Foundation to review and vary Telecom Regulatory Policy 2013-271 regarding expiry of prepaid wireless service cards, Telecom Decision CRTC 2014-101, 5 March 2014*
- *The Wireless Code, Telecom Regulatory Policy CRTC 2013-271, 3 June 2013*
- *Revised guidelines for review and vary applications, Telecom Information Bulletin CRTC 2011-214, 25 March 2011*