

Appendix D: Submissions in the substantive proceeding related to Telecom Order CRTC 2014-220

i) Part I Application by the DiversityCanada Foundation to Review and Vary Section J of
Telecom Regulatory Policy CRTC 2013-271
September 3, 2013

ii) Reply Comments by the DiversityCanada Foundation
October 17, 2013

**BEFORE THE CANADIAN RADIO-TELEVISION AND
TELECOMMUNICATIONS COMMISSION
IN THE MATTER OF AN APPLICATION BY
THE DIVERSITYCANADA FOUNDATION
(APPLICANT)**

**PURSUANT TO PART I
OF THE CRTC RULES OF PRACTICE AND PROCEDURE
AND SECTIONS 27, 56, 62 and 64
OF THE *TELECOMMUNICATIONS ACT***

**TO REVIEW AND VARY
SECTION J OF
TELECOM REGULATORY POLICY CRTC 2013-271**

03 SEPTEMBER 2013

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1.0 - Nature of the Application

1. The DiversityCanada Foundation, on its own behalf and on behalf of the National Pensioners and Senior Citizens Federation, (“DiversityCanada”), files this Application pursuant to Section 62 of the *Telecommunications Act*, S.C. 1993, c.38 (“the Act”) and under Part I of the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure* (SOR/2010-277) to review and vary Section J of Telecom Regulatory Policy CRTC 2013-271 (the “Decision”).
2. DiversityCanada submits that the Commission erred in law and in fact in not providing reasons for rejecting the evidence and arguments presented by DiversityCanada, and in not properly considering DiversityCanada's evidence and arguments in support of prohibiting the application of expiry dates to prepaid wireless balances.
3. In particular, DiversityCanada submits that the Commission:
 - a) failed to provide adequate support for its Decision and, therefore, breached its duty of procedural fairness;
 - b) ignored relevant facts and, therefore, arrived at an unreasonable conclusion; and
 - c) failed to consider the principle of unjust enrichment with respect to the seizure of prior accumulated balances that are unrelated to the purported “expired” top ups.
4. DiversityCanada therefore respectfully requests that the Commission:
 - i) Rescind Section J of the Decision;
 - ii) Hold a new hearing before a differently constituted panel on the subject of the expiration of prepaid wireless account balances;
 - iii) Allow interventions by any interested parties in the new hearing, with an opportunity to file new evidence in support of or in opposition to the expiration of prepaid wireless account balances;
 - iv) Grant DiversityCanada's reasonable costs related to this application.

2.0 - Background

5. As stated in *Telecom Regulatory Policy CRTC 2013-271*, in Telecom Decision 2012-556, the Commission determined that it was necessary to establish a mandatory code of conduct for wireless service providers (“WSPs”). The Wireless Code was intended to address the clarity and content of contracts for wireless services and related issues to ensure that consumers are empowered to make informed choices in the competitive market.
6. In Telecom Notice of Consultation 2012-557, the Commission initiated a proceeding to develop the Wireless Code (“the Proceeding”). The Commission asked for comments on the content of the Wireless Code; to whom the Wireless Code should apply; how the Wireless Code should be enforced and promoted; and how the Wireless Code’s effectiveness should be assessed and reviewed.
7. The Commission stated its preliminary view that the Wireless Code should address the clarity of WSPs’ contract terms and conditions; changes to these terms and conditions; contract cancellation, expiry, and renewal; the clarity of advertised prices; the application of the Code to bundles of telecommunications services; customer notifications of additional fees; privacy policies; hardware warranties and related issues; loss or theft of hardware; security deposits; and disconnections. The Commission also called for comments on any other provisions that would enable consumers to better understand their rights with respect to mobile wireless services.
8. In Telecom Notice of Consultation 2012-557-3, the Commission published the “Wireless Code Working Document” (the Draft Code) to stimulate discussion and debate. The Proceeding included a two-phase online consultation as well as a public hearing, which took place from 11 to 15 February 2013. Following the oral portion of the Proceeding, participants in the hearing submitted Final Written Comments and Final Replies.
9. The Commission received comments from over 5,000 participants, including hundreds of individual Canadians, as part of the online consultation and interventions in the Proceeding.
10. The following WSPs participated in the Proceeding: Amtelecom Limited Partnership;

Bell Aliant Regional Communications, Limited Partnership, Bell Canada, KMTS, and NorthernTel, Limited Partnership (collectively, Bell Canada et al.); Bell Mobility Inc., on behalf of itself, Solo, and Virgin Mobile; Bragg Communications Inc., operating as EastLink (EastLink); Data & Audio-Visual Enterprises Wireless Inc., operating as Mobilicity (Mobilicity); Globalive Wireless Management Corp., operating as WIND Mobile (WIND); Hay Communications Co-operative Limited; Huron Telecommunications Co-operative Limited; Mornington Communications Co-operative Limited; MTS Inc. and Allstream Inc. (collectively, MTS Allstream); Nexicom Mobility Inc.; Northwestel Inc.; People's Tel Limited Partnership; Public Mobile Inc. (Public Mobile); Quadro Communications Co-operative Inc.; Quebecor Media Inc. on behalf of Videotron G.P. (Videotron); Rogers Communications Partnership (RCP); Saskatchewan Telecommunications (SaskTel); Sogetel Mobilité inc.; TBayTel; TELUS Communications Company (TCC); and Vaxination Informatique (Vaxination).

11. The following consumer advocacy groups participated in the Proceeding: the Consumers Council of Canada (CCC); DiversityCanada; Media Access Canada (MAC) on behalf of the Access 2020 Group of Accessibility Stakeholders; the Mouvement Personne d'Abord du Québec; the Public Interest Advocacy Centre, as well as the Consumers' Association of Canada, and the Council of Senior Citizens' Organizations of British Columbia (collectively, PIAC et al.); the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC) on behalf of its client, OpenMedia.ca (OpenMedia); the Service de protection et d'information du consommateur (SPIC); and l'Union des consommateurs (l'Union).
12. Other participants included the following: the Canadian Wireless Telecommunications Association (CWTA); the Commissioner for Complaints for Telecommunications Services Inc. (CCTS); the Competition Bureau of Canada; Glenn Thibeault, Sudbury, Member of Parliament; the Government of Alberta; the Government of Manitoba's department of Healthy Living, Seniors and Consumers Affairs; the Government of the Northwest Territories; the Government of Ontario; the Government of Quebec through the ministère de la Culture et des Communications and the Office de la protection du consommateur; the Government of Yukon; the Office of the Privacy Commissioner of Canada; Drs. Catherine Middleton, Tamara Shepherd, Leslie Regan Shade, Kim Sawchuk, and Barbara Crow, professors and researchers of Communications studies (collectively, Middleton et al.); and Shaw Telecom Inc.
13. The following individuals appeared at the public hearing: Mr. Terry Duncan; Mr.

Glenn Fullerton; Mr. Tana Guindeba; Mr. Nasir Khan; Mr. Michael Lancione; Mr. Allan Munro; Mr. Frederick A. Nakos; Mr. Rainer Schoenen; and Mr. Daniel Sokolov.

DiversityCanada's position

14. During the Proceeding, DiversityCanada called for a ban on the practice whereby wireless providers place expiry dates on prepaid wireless "top up" payments. DiversityCanada noted that with prepaid wireless services, customers pay certain sums in advance and these amounts are recorded as cash balances or electronic credits. The balance in customers' accounts are reduced by the value of the goods or services purchased. Customers can add to their account balance by making further deposits, called "top ups". Wireless providers apply expiration dates to these top ups according to the amount deposited (eg a \$15 top up expires after 30 days). If a customer makes a top up payment before the expiry date, all funds already in the account are preserved and the balance is increased by the value of the top up. If, however, the customer does not make a top up before the expiry date, the wireless provider seizes the entire balance remaining in the customer's account.
15. DiversityCanada disputed the claim made by wireless service providers that the business model for prepaid wireless services was universally one whereby top ups are consideration for access to the wireless network for specific services, for a specified period of time.
16. DiversityCanada made the distinction between the two types of prepaid wireless services. One is a monthly plan, whereby customers do indeed pay for access to the wireless network for specific services and for a specified time.
17. The other type of prepaid wireless service is the pay-per-use service. DiversityCanada presented evidence that service providers advertise prepaid wireless pay-per-use account balances as cash balances that are to be used by subscribers to make purchases from among a variety of goods and services available via the wireless networks.
18. DiversityCanada also noted that customers with prepaid monthly plans also have pay-per-use funds (ie customers who pay their monthly service fee and add further top ups in order to purchase extra services) and that these pay-per-use funds are also seized by the wireless providers under the pretext of balance expiry.

19. DiversityCanada argued that for prepaid pay-per-use customers, the wireless service providers' claim of an "access to system" business model could not be inferred because: i) there was no offer of the nature claimed by the wireless providers, and, therefore, ii) there was no acceptance by consumers of any offer of the nature claimed by the wireless providers.

20. Furthermore, DiversityCanada argued that because of the nature of the offer actually presented (ie, top up are cash balances for use by consumers at their discretion to buy goods or services offered by the WSPs) the assertion that remaining balances are taken as consideration for access to the network:
 - represented either false advertising as to the nature of top ups; or
 - represented unilateral changes to material terms of the agreement;
 - was unfair to customers with monthly plans who already paid the sum agreed to for network access;
 - resulted in unjust enrichment of wireless service providers who confiscate the remaining balances;
 - resulted in a more egregious form of unjust enrichment when the accumulated balances from prior top ups that are unrelated to the most recent top ups are confiscated as payment for "access for a specified time" associated with the most recent top up.

21. Additionally, DiversityCanada argued that because top ups are advertised/offered to the public as cash balances, they were future performance agreements akin to gift cards or prepaid purchase cards, and that all provinces had banned the application of expiry dates to such payments. DiversityCanada called on the Commission to prohibit prepaid wireless balance expiry in order to ensure prepaid wireless customers enjoyed the protections they were entitled to under provincial laws.

22. At section 19 of the Decision, the Commission dealt with the expiration of prepaid wireless cards by reviewing the positions of the parties, providing its analysis and stating its determination. As can be seen from this section (quoted in full below), the Commission made no mention of the arguments raised by DiversityCanada, which conflicted with the arguments and assertions made by the WSPs. Neither did the Commission state any reason why it rejected the arguments made by DiversityCanada.

19. Expiration of prepaid cards

Positions of parties

339. Prepaid wireless service cards (prepaid cards) are subject to an expiry date determined by the WSP and ranging from 15 days to one year following activation, depending usually on the value of the card (e.g. a \$100 prepaid card generally has a later expiry date than a \$30 card). To continue service and/or carry over credits beyond the expiry date, consumers can choose to “top-up” or add money to their account via the WSP’s website and/or by purchasing additional prepaid cards.

340. Many consumers submitted that they were frustrated that their account balances expire immediately if they do not “top up,” and that, if they missed the end of their account by one day, their balance would be lost. These consumers therefore requested that the Commission require WSPs to carry over prepaid account balances indefinitely.

341. Some consumer groups and individuals submitted that the Wireless Code should prohibit the expiration of prepaid cards (i.e. services not used within the timeframe allotted should roll over indefinitely).

342. WSPs argued that prepaid cards should not be prohibited from expiration, since the business model is based on providing time-limited access to the network.

343. The CWTA submitted that prepaid services are not defined solely by the purchase of minutes. The CWTA stated that prepaid service models provide access to the network (e.g. the ability to receive or send calls, text messages or data) as well as predetermined usage volumes (e.g. a set number of minutes, texts or megabytes; or unlimited usage for a fixed duration). Prepaid wireless service balances also typically do not have an expiry date; rather they have a usage period that begins once the balance is activated. Many prepaid services allow customers to carry over unused minutes to a new usage period as long as the customer refreshes the account before the end of the term.

344. RCP and Bell Canada et al. argued that customers already understand how prepaid services function and how to manage their accounts. They submitted that consumers are already informed of the conditions applicable to their prepaid balances, including the usage period. Bell Canada et al. further stated that alternatives already exist to prevent account expiry.

345. WSPs generally agreed with the CWTA that a prepaid card is substantially different from a gift card, in that prepaid cards are a billing mechanism for a specific service over a period of time. SaskTel stated that once a prepaid card is activated, there is recognition that the card has been used to purchase an ongoing service, and that there is a cost to retaining this service over time.

346. SaskTel argued that if a prepaid balance were to never expire, customers might purchase a

prepaid plan and use the device infrequently or only in cases of emergency. SaskTel expressed concern that this could result in significant numbering resources being assigned to devices that are infrequently or never used. TCC also argued that it would not be reasonable for a WSP to be obligated in perpetuity to a customer, especially when the company has no contact information for the customer and cannot even know if they reside in Canada or are deceased, for example. For these reasons, TCC argued that there must be a time when a prepaid account is considered to have been abandoned, and the accounting standard is 90 days.

Commission's analysis

347. The Commission considers that consumers' key requests related to prepaid cards are (i) for WSPs to carry over their account balances (which may be represented in terms of minutes, text messages, or other usage) indefinitely if unused; and (ii) for consumers to be able to "top up" their accounts a bit late.

348. The Commission considers that WSPs should hold prepaid card customers' accounts open for seven days following expiry of an activated prepaid card to give customers more time to "top up" their accounts. The Commission considers that such a requirement would (i) not impose a significant burden on WSPs; (ii) improve clarity regarding prepaid service billing and policies; (iii) balance consumer interests with current market realities; and (iv) increase flexibility for frequent users of prepaid services.

349. The Commission considers that the evidence on the record of the proceeding does not support consumers' request for WSPs to carry over their prepaid unused minutes indefinitely. In this regard, the Commission notes that wireless services, including prepaid card services, provide access to the network for a specific period of time with specific usage limitations that are distinct for each aspect of the service. The Commission considers that imposing a requirement that services be provided beyond the limitations set out in the service agreement would not be appropriate.

Commission's determinations

350. In light of the above, the Commission requires WSPs to hold prepaid customers' accounts open for at least seven days following the expiry of an activated card at no charge to give customers more time to "top up" their accounts and retain their prepaid balance.

3.0 - Criteria for Review and Variance

23. In *Telecom Information Bulletin CRTC 2011-214, Revised guidelines for review and vary applications* (25 March 2011) the Commission restated its revised guidelines for review and vary applications under the new *CRTC Rules of Practice and Procedure*.
24. Under the revised Guidelines, the test for an application brought under s. 62 of the *Telecommunications Act* is:
- [. . .] that there is substantial doubt as to the correctness of the original decision, for example due to
 - (i) an error in law or in fact;
 - (ii) a fundamental change in circumstances or facts since the decision;
 - (iii) a failure to consider a basic principle which had been raised in the original proceeding; or
 - (iv) a new principle which has arisen as a result of the decision.
25. The Guidelines also state in para. 6 that: "there may be instances where [the Commission] will first decide whether a review is warranted – for example, where it considers there was a procedural error – and only then conduct a proceeding to determine whether to vary the decision."
26. DiversityCanada submits that there are no circumstances that should put the need for this review into question, and that it is in the public interest that this application go forward.

4.0 - Reasons for Review and Variance (Errors in Law or in Fact)

4.0 a) Absence of Reasons

27. The Commission provided no reason as to *why* it rejected DiversityCanada's position or the evidence presented by DiversityCanada. DiversityCanada submits that the absence of reasons amounts to a breach of procedural fairness which raises substantial doubt as to the correctness of Section J of the Decision.
28. Paragraphs 347 to 349 of the Decision come under the heading "Commission's analysis". The first two paragraphs in this section deal with the rationale for implementing a new seven-day "grace period" to expiry dates on prepaid wireless services. The only paragraph that deals with the decision not to prohibit expiration of prepaid wireless account balances is paragraph 349, in which the Commission says:
- "The Commission considers that the evidence on the record of the proceeding does not support consumers' request for WSPs to carry over their prepaid unused minutes indefinitely. In this regard, the Commission notes that wireless services, including prepaid card services, provide access to the network for a specific period of time with specific usage limitations that are distinct for each aspect of the service. The Commission considers that imposing a requirement that services be provided beyond the limitations set out in the service agreement would not be appropriate."
29. This, however, is not a *reason* for not prohibiting the application of expiry dates on prepaid wireless services. Instead, DiversityCanada submits that this is a conclusion, and it does not indicate how or why the Commission came to its determination. It is akin to the statement "my reasons are that I think so" mentioned to by Keith J. in *Re Canada Metal Co. Ltd. et al. and MacFarlane*¹, at p. 587.
30. Neither in paragraph 349 nor in the other parts of the Decision does the Commission explain, for instance, why it rejected DiversityCanada's arguments that the nature of the offer for pay-per-use prepaid wireless services was not as claimed by the WSPs; that the terms of the prepaid pay-per-use agreements could not be reconciled with the

1 1973 1 O.R. (2d) 577

WSP's contention that prepaid wireless cards were payments for access to the network; and that the WSP's contention represented either false advertising or unilateral changes to an agreement. Nor does paragraph 349 address why the Commission did not agree with DiversityCanada's assertion that unjust enrichment occurs when prior accumulated sums unrelated to current top ups were seized.

31. The Commission is required to provide reasons for its decisions as part of its obligation to comply with principles of natural justice and procedural fairness. The Supreme Court of Canada held in *Baker v. Canada (Minister of Citizenship and Immigration)*² at paragraph 43:

“...it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. . . .

32. Section 64 (1) of the *Telecommunications Act* states: “An appeal from a decision of the Commission on any question of law or of jurisdiction may be brought in the Federal Court of Appeal with the leave of that Court.” Therefore, every party with an interest in the Decision has a statutory right of appeal and ought to have been provided a written explanation for the Decision in order to make a determination as to whether an appeal should be pursued.
33. DiversityCanada submits that the summary and the conclusion provided by the Commission are not sufficient to satisfy the crucial role that reasons play in the judicial process. The required standard for reasons was outlined in *Clifford v. Ontario (Attorney General)*³, in which a tribunal was castigated for delivering a decision by merely stating that its conclusion was “[based] on all of the evidence”, in similar fashion as the Commission merely stated that it considered the evidence on the record did not support the prohibition of expiry dates on prepaid wireless services. In *Clifford*, the court said at paragraph 29 to 30:

2 1999 2 SCR 817 (“*Baker*”)

3 2008 ON SCD (Clifford”)

[29] It is not sufficient for the Tribunal to simply summarize the positions of the parties and baldly state its conclusions. Reasons are required; not merely conclusions: *Megens v Ontario Racing Commission*, (2003) 64 O.R. (3rd) 142 (Div.Ct.). As was stated by the Ontario Court of Appeal in *Gray v. Ontario (Disability Support Program, Director)* (ON CA), (2002), 59 O.R. (3d) 364 at 374-375, 212 D.L.R. (4th) 353 at 364 (C.A.):

The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather the decision maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors.

[30] For a tribunal such as this one, on issues of the importance involved here, the failure to provide meaningful reasons supporting its decision is itself a breach of the principles of natural justice that will warrant quashing the tribunal's decision: *Baker; Megens v. Ontario Racing Commission*. This is particularly the case in light of the conflicts in the evidence and the apparent failure of the Tribunal to place the onus on the correct party.

34. The Proceeding before the Commission was not an instance in which the evidence was such that no reasons were required. In fact, the opposite is the case. As in *Clifford*, the Proceeding presented an instance in which there were conflicts in the evidence.
35. In the Proceeding, the WSPs testified that prepaid wireless top ups were payments for access to the network for specified services for a specified period of time, but submitted no further evidence that this is the manner in which the offer for such services was presented to prepaid wireless consumers. DiversityCanada contradicted the assertion of the WSPs and testified that no offer of the nature claimed by the WSPs had been made to consumers. Furthermore, DiversityCanada presented evidence, including WSP's advertisements, which it argued proved that prepaid wireless top ups were promoted to consumers as cash balances over which consumers retained discretion to spend on goods and services of their choice, and, as such, these cash balances could not be seized as payments for access to the network for specified services over a specified period, based both on the common law and on provincial consumer protection legislation that protected such forms of payment.
36. DiversityCanada submits that the Commission's Decision does not show how the Commission assessed the evidence and the conflicting positions to arrive at its

conclusion. In *R. v. Sheppard*⁴, the Supreme Court of Canada established the necessity of doing so, when it stated at paragraph 46:

...where the path taken by the trial judge through confused or conflicting evidence is not at all apparent, or there are difficult issues of law that need to be confronted but which the trial judge has circumnavigated without explanation, or where (as here) there are conflicting theories for why the trial judge might have decided as he or she did, at least some of which would clearly constitute reversible error, the appeal court may in some cases consider itself unable to give effect to the statutory right of appeal. In such a case, one or other of the parties may question the correctness of the result, but will wrongly have been deprived by the absence or inadequacy of reasons of the opportunity to have the trial verdict properly scrutinized on appeal. In such a case, even if the record discloses evidence that on one view could support a reasonable verdict, the deficiencies in the reasons may amount to an error of law and justify appellate intervention.

37. DiversityCanada submits that the Commission's Decision does not provide enough support for its Decision. The absence of reasons in the Decision prevented DiversityCanada and every prepaid wireless consumer who has an interest in the Decision from giving informed consideration to grounds for appeal. Thus, an error of law has been committed.
38. DiversityCanada submits that the record provides no assistance in ascertaining the reasons for the Commission's Decision. DiversityCanada's fullest arguments as to the nature of prepaid wireless contracts as well as the arguments concerning unjust enrichment with respect to prior accumulated balances, for example, were presented in written comments after the hearing, and the Commission's only role at that stage of the proceeding was to receive these written submissions. The Commission did not comment in any meaningful way on the arguments submitted by DiversityCanada during the hearing.
39. The requirement to provide reasons, particularly where the record is incapable of showing how the Commission came to its decision, was addressed in *R. v. R. (D.)*⁵, in which Major J, delivering the majority opinion, stated at paragraph 54 to 55:

54 It is my view that the trial judge erred in law by failing to address the confusing

4 2002 SCC 26, [2002] 1 SCR 869
5 1996 2 SCR 291

evidence, and failing to separate fact from fiction. In *Burns, supra*⁶, McLachlin J., writing for the Court, stated, at p. 665:

This statement should not be read as placing on trial judges a positive duty to demonstrate in their reasons that they have completely appreciated each aspect of relevant evidence. The statement does not refer to the case where the trial judge has failed to allude to difficulties in the evidence, but rather to the case where the trial judge's reasons demonstrate that he or she has failed to grasp an important point or has chosen to disregard it, leading to the conclusion that the verdict was not one which the trier of fact could reasonably have reached.

55 McLachlin J. clearly set out the law regarding the requirement of trial judges to give reasons in *Burns*. However, it should be remembered that *Burns* dealt with a situation where the Court of Appeal agreed the trial judge had evidence before him to support the conclusion he reached, but overturned the verdict due to lack of reasons. The above-quoted passage does not stand for the proposition that trial judges are never required to give reasons. Nor does it mean that they are always required to give reasons. Depending on the circumstances of a particular case, it may be desirable that trial judges explain their conclusions. Where the reasons demonstrate that the trial judge has considered the important issues in a case, or where the record clearly reveals the trial judge's reasons, or where the evidence is such that no reasons are necessary, appellate courts will not interfere. Equally, in cases such as this, where there is confused and contradictory evidence, the trial judge should give reasons for his or her conclusions. The trial judge in this case did not do so. She failed to address the troublesome evidence, and she failed to identify the basis on which she convicted D.R. and H.R. of assault. This is an error of law necessitating a new trial.

40. As in the above result, in *Clifford*, the decision of the Tribunal was quashed and the matter was remitted to the Tribunal for a new hearing, before a differently constituted panel. DiversityCanada submits that Section J of the Wireless Code be rescinded and a new hearing before a differently constituted panel be held on the subject of the expiration of prepaid wireless account balances, as outlined in paragraph 4 (Section 1.0) of this submission herein.

6 R. v. Burns, 1994 (SCC), [1994] 1 S.C.R. 656

4.0 (b) Evidence Ignored

41. DiversityCanada also submits that in making its Decision, the Commission ignored evidence.
42. In *Flores v. Canada (Citizenship and Immigration)*, the court stated: “It is trite law that decision makers are presumed to have considered all the evidence before them, absent strong indications to the contrary.” DiversityCanada submits that the Commission did not consider all the evidence before it.
43. Presenting its conclusion, the Commission stated in paragraph 349 of the Decision that it “considers that the evidence on the record of the proceeding does not support consumers’ request for WSPs to carry over their prepaid unused minutes indefinitely”, and that it “notes that wireless services, including prepaid card services, provide access to the network for a specific period of time with specific usage limitations that are distinct for each aspect of the service”. The Commission further stated that it “considers that imposing a requirement that services be provided beyond the limitations set out in the service agreement would not be appropriate”.
44. Thus, it would appear that the Commission came to the conclusion that the service agreement related to prepaid cards was one for access to the network for specific usage over a specified period, and, therefore, pay-per-use consumers did not have discretion over what the funds in their account could be applied to. Furthermore, the implication is that the Commission found that there is no expiry date and that WSPs do not confiscate the remaining funds in the accounts of prepaid wireless customers on the purported expiry date of the last top up; instead, the Commission appears to have concluded that when the usage period for access to the network (related to the last top up) ended, WSPs simply collected payment for that usage period by taking all of the funds remaining in a consumer's account.
45. DiversityCanada submits that the Commission erroneously came to that finding based on the evidence that was before it.
46. While the WSPs and the CWTA argued throughout the Proceeding that prepaid

wireless top ups constituted payment for network access for specified services for a limited time period, they put no evidence before the Commission to support this position. There is no evidence on the record of the Proceeding that WSPs present to consumers an offer for pay-per-use wireless services which specifies that consumers will pay all of the balance remaining on their account as consideration for "access to the network" after a set time period. The WSPs failed to produce such evidence despite the fact that as providers of the services, the WSPs generate all materials that establish the agreements for the provision of prepaid wireless services.

47. By contrast, the consumer interests groups, PIAC and DiversityCanada, placed evidence on the record⁸, such as top up cards issued by the WSPs; pages from websites operated by WSPs that present prepaid offerings to the public; and a transcript of a customer service representative of one WSP explaining the prepaid wireless offering. In particular, DiversityCanada quoted a statement from Virgin Mobile Canada, which it said was typical of the manner in which WSPs promote prepaid wireless services to consumers: "Topping up is how you add cash to your Virgin Mobile prepaid account. When you have a prepaid phone, use your cash to make phone calls, buy ringtones, send text messages, download games... it's up to you."
48. At the hearing and in the written filings that followed, DiversityCanada maintained this evidence clearly demonstrated that top ups for pay-per-use prepaid wireless services were cash balances over which customers had discretion to purchase goods and services offered by the WSPs over their network. DiversityCanada argued that "access to the network", as described by the WSPs, was a commodity in and of itself, which, therefore, would also be subject to purchase at the consumer's discretion; and that a pay-per-use agreement which gave customers discretion over their funds could not be reconciled with the WSPs' assertion that the agreement was, in fact, one whereby all funds in the customer's account constituted payment for access to the network for specified services over a specified time.
49. DiversityCanada went to lengths to highlight to the Commission the very fact that there was no evidence to support the WSPs' claim that pay-per-use prepaid wireless consumers were offered a service agreement for access to the network for specified usage over a specified time period. In DiversityCanada's Final Written Comments in the Proceedings, DiversityCanada's consumer-spokesperson, Ms. Celia Sankar, told the

8 Appendix D of PIAC's December 04, 2012 submission; Exhibits 1 and 3 of DiversityCanada's Presentation at the Hearing on February 13, 2013

Commission:

I am or have been a wireless consumer with Telus, Bell and Rogers, either under their brands or flanker brands and have never been made the offer described by the industry. I have surveyed the current offerings and have not come across it either. No service provider on the market today makes any express offer to any prepaid customer (whether a pay-per-use customer or a time-plus-usage customer who makes an extra top up to purchase extra services) of “access to the network” to be paid for with the funds remaining from his or her top up payment. ...

If the offer was never expressly made, it can not be said to have been accepted. It is simply not possible for a consumer to agree to purchase something which she does not even know is being offered.

No offer. No acceptance. Therefore, balance expiry can not be justified as payment of consideration for access to the service provider's system. The Commission must prohibit this practice.

50. The issue of the evidence before the Commission is also important on the question of whether the funds in consumers' accounts were confiscated on an expiry date, or whether these funds were simply collected as payment for specified services at the end of a specified usage period. Although it did not put it in such terms, the fact that the Commission came to the conclusion that prepaid cards were payment for specified services over a specified time period means that the Commission found that there was no expiry date applied to prepaid wireless services. DiversityCanada submits that this was not a reasonable finding based on the evidence before the Commission.
51. The CTWA claimed prepaid wireless service balances “typically do not have an ‘expiry date’; rather they have a usage period that begins once the balance is activated”. However, the CWTA offered no evidence to support that position. Conversely, DiversityCanada, directed the Commission's attention to the evidence put on the public record by PIAC and DiversityCanada in which several providers use precisely these terms: “Balance Expiry Date”; “Expires”; “unused funds will expire”; “expired amounts”; and “Funds expire”. These terms appear on the top up cards themselves.
52. DiversityCanada argued that a recurring theme throughout the Proceeding had been that WSPs must not charge a consumer for anything unless they had first received express approval from the consumer for such a charge, and that the practice of applying expiry dates to prepaid wireless cards violated this principle.

DiversityCanada asserted that balance expiry was outright confiscation of consumers' funds and called on the Commission to protect consumers from having their funds taken without their consent by prohibiting the practice of balance expiry.

53. Did the Commission take into consideration the evidence put before it by PIAC and DiversityCanada which showed the exact nature of the WSPs' prepaid wireless offerings? Did the Commission give weight to evidence that top ups were presented to consumers as cash balances to be used at consumers' discretion? And, as for the issue of balance expiry, did the Commission consider the evidence that the top up cards themselves explicitly stated the remaining funds or balances would expire on a purported expiry date?
54. DiversityCanada submits that there are strong indications that the Commission did not.
55. First, this evidence is absent from the Decision. The omission of any reference to the evidence and to DiversityCanada's related arguments in the Decision would suggest that the Commission ignored this evidence and the associated arguments.
56. Second, the Commission's conclusion that the prepaid wireless cards amount to payments for access to the network for specific services for a specified period is contrary to the evidence it had before it to consider.
57. DiversityCanada submits that the Commission's conclusion agreeing with the WSPs' assertions was made without regard to the entire evidence of DiversityCanada and the consumer interest groups.
58. Therefore, DiversityCanada respectfully submits that Section J of the Decision be rescinded as outlined in paragraph 4 of section 1.0 herein.

4.0 (c) Did Not Consider the Principle of Unjust Enrichment

59. DiversityCanada submits that the Decision was not reasonable because the Commission failed to consider the principle of unjust enrichment raised by DiversityCanada in the Proceeding. DiversityCanada argued that unjust enrichment occurs when WSPs seize the remaining balances from consumers' accounts and that the Commission should prohibit the practice of applying expiry dates to prepaid wireless services in order to end this injustice.
60. With respect to unjust enrichment, the court stated in *Rathwell v. Rathwell*:
- ...for the principle to succeed, the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason—such as a contract or disposition of law—for the enrichment.
61. During the Proceeding, DiversityCanada described in detail the prepaid wireless pay-per-use business model and the process whereby WSPs seize the remaining balances in consumers' accounts on the purported expiry dates. This seizure of the remaining balance in consumers' accounts satisfies two of the elements of unjust enrichment: the enrichment and the corresponding deprivation.
62. DiversityCanada argued that unjust enrichment occurs because there is no juristic reason for the enrichment of the WSPs and that unjust enrichment could be identified on two levels. The first involved the remaining balances of the last top up, and the second involved the balances accumulated prior to the last top up.
63. With respect to the remaining balances of the last top up, DiversityCanada argued that since the top ups represented a means for consumers to add to a cash balance over which they had discretion, then there was no justification for seizure of the remaining balance as “payment for specified services for a specified time period” as no such offer was made and none had been accepted by the consumer.
64. With respect to the balances accumulated prior to the last top up, DiversityCanada submitted to the Commission that the case for unjust enrichment was clear. Prior accumulated balances were totally unrelated to the agreement between the consumer and the WSP concerning the last top up. Therefore, there was no juristic reason for

WSPs to enrich themselves by seizing the prior accumulated balances in consumers' accounts that were unrelated to the last top up on the purported expiry date of the last top up.

65. The Commission came to the finding that prepaid wireless cards were payment for specified services for a specific time period, thereby rejecting DiversityCanada's argument with respect to unjust enrichment related to the last top up.
66. However, this finding still left the principle of unjust enrichment with respect to prior accumulated balances that are unrelated to the last top up to be addressed. The Decision omits any reference to this unjust enrichment. DiversityCanada submits that the Commission failed to consider this basic principle.
67. The unjust enrichment described by DiversityCanada during the Proceeding contravenes the *Telecommunications Act*, which states:

“27. (1) Every rate charged by a Canadian carrier for a telecommunications service shall be just and reasonable.”
68. Given that the sector of the market which relies on prepaid wireless services includes some of the most vulnerable consumers (including pensioners, youth, the unemployed, minimum-wage workers, persons on disability benefits, and newcomers to Canada), DiversityCanada submits that it is in the public interest that this unjust enrichment not be allowed to continue.
69. In conclusion, DiversityCanada respectfully submits that it is unreasonable for the Commission to leave intact a situation whereby WSPs unjustly enrich themselves at the expense of prepaid wireless consumers. Therefore, as per paragraph 4 of section 1.0 herein, Section J of the Decision should be rescinded.

5.0 - Conclusions

70. In summary, DiversityCanada submits that the Commission erred in law and in fact in not providing reasons for rejecting the evidence and arguments presented by DiversityCanada, and in not properly considering DiversityCanada's evidence and arguments in support of prohibiting the application of expiry dates to prepaid wireless balances. The errors raise substantial doubt as to the correctness of Section J of the Decision.

71. In particular, DiversityCanada submits that the Commission:

- i) failed to provide adequate support for in its Decision and, therefore, breached its duty of procedural fairness;
- ii) ignored relevant facts and, therefore, arrived at an unreasonable conclusion; and
- iii) failed to consider the principle of unjust enrichment with respect to the seizure of prior accumulated balances that are unrelated to the purported "expired" top ups.

72. DiversityCanada therefore respectfully requests that the Commission:

- i) Rescind Section J of the Decision;
- ii) Hold a new hearing before a differently constituted panel on the subject of the expiration of prepaid wireless account balances;
- iii) Allow interventions by any interested parties in the new hearing, with an opportunity to file new evidence in support of or in opposition to the expiration of prepaid wireless account balances;
- iv) Grant DiversityCanada's reasonable costs related to this application.

73. All of which is respectfully submitted this 3rd day of September, 2013.

6.0 - Parties Served

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7.0 - Notice

This application is made by **Ray Kindiak, legal counsel**, c/o DiversityCanada Foundation, 95 Hutchison Avenue, Elliot Lake, ON P5A 1W9 [Email: telecom_policy@diversitycanada.org]. A copy of this application may be obtained by sending a request to telecom_policy@diversitycanada.org

TAKE NOTICE that pursuant to section 25, and, as applicable section 26 of the Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure, any respondent or intervener is required to mail or deliver or transmit by electronic mail its answer to this application to the Secretary General of the Canadian Radio-television and Telecommunications Commission (“Commission”), Central Building, 1 Promenade du Portage, Gatineau (Québec) J8X 4B1, and to serve a copy of the answer on the applicant within 30 days of the date that this application is posted on the Commission’s website or by such other date as the Commission may specify.

Service of the copy of the answer on the applicant may be effected by personal delivery, by electronic mail, or by ordinary mail. In the case of service by personal delivery, it may be effected at the address set out above.

If a respondent does not file or serve its answer within the time limit prescribed, the application may be disposed of without further notice to it.

****End of Document****

**BEFORE THE CANADIAN RADIO-TELEVISION AND
TELECOMMUNICATIONS COMMISSION
IN THE MATTER OF AN APPLICATION BY
THE DIVERSITYCANADA FOUNDATION
(APPLICANT)**

**PURSUANT TO PART I
OF THE CRTC RULES OF PRACTICE AND PROCEDURE
AND SECTIONS 27, 56, 62 and 64
OF THE TELECOMMUNICATIONS ACT**

**TO REVIEW AND VARY
SECTION J OF
TELECOM REGULATORY POLICY CRTC 2013-271**

**REPLY COMMENTS BY
THE DIVERSITYCANADA FOUNDATION**

17 OCTOBER 2013

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1.0 Introduction

1. The DiversityCanada Foundation (“DiversityCanada”), on its own behalf and on behalf of the National Pensioners and Senior Citizens Federation, by its counsel, files these comments pursuant to the *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure (SOR/2010-277)* (the “Rules”) in reply to Answers of the respondents and to an Intervention in DiversityCanada's Part 1 Application to Review and Vary Section J of Telecom Regulatory Policy CRTC 2013-271 (the “Decision”).
2. DiversityCanada based its Application on the grounds that the Commission:
 - a) failed to provide adequate support for its Decision and, therefore, breached its duty of procedural fairness;
 - b) ignored relevant facts and, therefore, arrived at an unreasonable conclusion; and
 - c) failed to consider the principle of unjust enrichment with respect to the seizure of prior accumulated balances that are unrelated to the purported “expired” top ups.
3. DiversityCanada requested that the Commission:
 - i) Rescind Section J of the Decision;
 - ii) Hold a new hearing before a differently constituted panel on the subject of the expiration of prepaid wireless account balances;
 - iii) Allow interventions by any interested parties in the new hearing, with an opportunity to file new evidence in support of or in opposition to the expiration of prepaid wireless account balances;
 - iv) Grant DiversityCanada's reasonable costs related to this Application.
4. In these Reply Comments, DiversityCanada addresses aspects of the two respondents' Answers and of one Intervention which refute DiversityCanada's position or raise new issues. DiversityCanada respectfully submits that not addressing a party's submissions does not indicate agreement with that position.

2.0 Absence of Reasons

2.0 a) Standard of Review

5. In its submission, the Canadian Wireless Telecommunications Association (CWTA) mischaracterized the first basis upon which DiversityCanada filed its review and variance Application, and then continued off-topic, instead of addressing the issue actually raised by DiversityCanada.
6. DiversityCanada's Application submitted that the Commission failed to provide “adequate support” for its Decision. The CWTA inappropriately suggested this was a claim by DiversityCanada that the Commission did not provide “adequate reasons” or “sufficient reasons” for the Decision. DiversityCanada submits that its Application was clear and consistent in asserting that there was an absence of reasons in the Decision. The Application noted that the Decision presented conclusions not supported by reasons. DiversityCanada respectfully submits that “adequate support”, therefore, should consist of conclusions which are accompanied and explained by reasons.
7. The CWTA said:

DiversityCanada’s primary ground in support of its Application is the Commission’s purported failure to provide *sufficient reasons* for not adopting DiversityCanada’s proposal to ban Wireless Service Providers (WSPs) from applying expiry dates to pre-paid service payments. [Emphasis added]
8. The CWTA then cited passages from *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*¹ in an attempt to refute DiversityCanada's assertion that the Decision was not correct because of an absence of reasons.
9. DiversityCanada submits that *Newfoundland* is entirely unhelpful to the CWTA; in fact, while the case itself does not address the issue raised by DiversityCanada, comments made by the Supreme Court in this decision actually bolster DiversityCanada's position.

1 2011 3 SCR 708 (“*Newfoundland*”)

10. *Newfoundland* involved a case in which, as the court specifically noted, “Procedural fairness was not raised either before the reviewing judge or the Court of Appeal and it can be easily disposed of here.”² The Supreme Court went on to state: “It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review.”³
11. As stated in the passage quoted by the CWTA in paragraph 8 of its submission, the *Newfoundland* ruling concerns judicial reviews of the “adequacy” of reasons; furthermore, such reviews fall “under a reasonableness analysis”.
12. DiversityCanada's assertion was not that the Commission's Decision was unreasonable because reasons presented were somehow deficient. Rather, DiversityCanada argued that the Decision was not correct because of the absence of reasons.
13. In *Dunsmuir v. New Brunswick*,⁴ the Supreme Court of Canada made it clear that correctness and reasonableness are distinct standards of review, by stating:

There ought to be only two standards of review: correctness and reasonableness.

When applying the correctness standard in respect of jurisdictional and some other questions of law, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question and decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable. Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

14. *Dunsmuir* further states: “The standard of correctness should also apply to the requirements of 'procedural fairness'.... ”

2 Ibid., para. 20

3 Ibid., para. 22

4 2008 1 SCR 190 (“*Dunsmuir*”)

15. In paragraph 27 of its Application, DiversityCanada submitted that “the absence of reasons amounts to a breach of procedural fairness which raises substantial doubt as to the correctness of Section J of the Decision”.
16. DiversityCanada noted that a) section 64 (1) of the *Telecommunications Act* grants a right of appeal from decisions of the Commission to the Federal Court of Appeal; and that b) the Supreme Court established in *Baker v. Canada (Minister of Citizenship and Immigration)*⁵ that where there is a statutory right of appeal “the duty of procedural fairness will require the provision of a written explanation for a decision”.
17. In summary, DiversityCanada's position (as validated by *Newfoundland*) is that the absence of reasons in the Decision is a breach of procedural fairness and an error in law, and, as such, the appropriate standard of review with respect to this ground for review is not reasonableness, but correctness.

2.0 b) Distinction between Reasons and Conclusions

18. The first ground for DiversityCanada's Application turns on the question of whether paragraph 349 of the Decision presents reasons or conclusions.
19. Bringing forward the *Newfoundland* case law, the CWTA made an attempt to give the 88 words of that paragraph the quality of reasons. However, even the CWTA itself could not escape the true nature of that passage of the Decision.
20. At paragraph 11 of its submission, the CWTA quoted from the passage in question and then immediately went on state, quite pointedly:

“*This is a clear finding of fact....*” [Emphasis added]
21. Indeed it is.

22. DiversityCanada submits that all of paragraph 349 presents findings of fact. This paragraph contains three conclusions, none of which serves as reasons for the other or for the outcome itself, according to the guidance given by the bench as to the elements and qualities that comprise a reason.

23. As cited in DiversityCanada's Application, the courts have made it clear that reasons and conclusions are two distinct concepts:

Reasons are required; not merely conclusions....⁶

Depending on the circumstances of a particular case, it may be desirable that trial judges explain their conclusions. ... Equally, in cases such as this, where there is confused and contradictory evidence, the trial judge should give reasons for his or her conclusions.⁷

24. As the second quote suggests, a reason is an explanation of how and why a decision-maker settled on a certain conclusion, or finding of fact. In *R. v. Sheppard*⁸ the Supreme Court described this as showing “the path taken by the trial judge through confused or conflicting evidence”.

25. *Clifford* quoted an earlier decision which further specified elements that make up a reason:

The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather the decision maker must set out its findings of fact *and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors.*⁹ [Emphasis added]

26. In its submission, the CWTA referred to paragraph 349 of the Decision as both a reason and a conclusion. A closer examination of this paragraph should help to clarify the difference between conclusions and reasons.

⁶ *Clifford v. Ontario (Attorney General)* 2008 90 O.R. (3d) 742 (“*Clifford*”); para. 33 of the Application

⁷ *R. v. R. (D.)* 1996 2 SCR 291; para. 39 of the Application

⁸ 1996 2 SCR 291; para. 36 of the Application

⁹ Para. 33 of the Application

27. Paragraph 349 begins: “The Commission considers that the evidence on the record of the proceeding does not support consumers’ request for WSPs to carry over their prepaid unused minutes indefinitely.”
28. This sentence presents the key finding that prepaid wireless accounts contain unused minutes – rather than cash balances – and that these unused minutes could not be carried over indefinitely.
29. The record shows that the WSPs presented no evidence to prove that account balances present a record of unused minutes. The WSPs merely provided testimony on this issue, and conflicting testimony at that.
30. At the Hearing, for example, TELUS made the following claim:

1999. Once you've activated, the reason the minutes have to expire is because you've used it to now top up your account, add minutes to the account. The only reason -- like, as long as you do something that ensures that that account is staying active, like add more minutes to it or utilize the device and draw down the minutes, then we'll keep, you know, the minutes alive, right, we'll keep topping it up and we have customers with, you know, very high balances because they, you know, kept it active with top-ups every single month for many years.¹⁰

31. However, in an exchange¹¹ in which one Commissioner sought an explanation as to how prepaid wireless pay-per-use accounts work, WIND Mobile repeatedly made it explicit that the account is a record of cash balances, stating at one point:

9882 ... You put money in the account and every time you make an outgoing call it's \$0.20 a minute, there is no charge for incoming calls, and when you send a text for Canada or U.S. you pay \$0.15 a call. So you can't do any of those actions unless there is money in the account.

¹⁰ TNC CRTC 2012-557 Transcript of Proceeding, Volume 1, 11 February 2013. This testimony by TELUS that topping up equates adding minutes directly conflicts with the evidence referred to in footnote 12, in which a TELUS prepaid wireless card states “Once deposited into your account, card value is valid for 60 days”; the value on the card is expressed in monetary terms (i.e. “50 dollars”). In other words, in the real world, TELUS tells customers that by topping up, what they are adding to their accounts is cash, rather than minutes, as TELUS suggested in its testimony before the Commission.

¹¹ Ibid. Volume 5, 15 February 2013; 9871 to 9915

32. Furthermore, the record shows that consumer interest groups provided evidence (promotional materials as well as screenshots of account balance information transmitted to account holders via the phone)¹² which demonstrated that WSPs told customers that prepaid wireless accounts held “funds” or “cash” or a monetary value, such as “\$114.00”.
33. The evidence included the promotional statement from Virgin Mobile Canada, which read: “Topping up is how you add cash to your Virgin Mobile prepaid account. When you have a prepaid phone, use your cash to make phone calls, buy ringtones, send text messages, download games... it's up to you.”
34. Additionally, DiversityCanada argued¹³:

It has to be pointed out that some in the wireless industry are either trying to mislead the Commission or have not grasped that the wireless industry has rapidly evolved over the last few years and you can now do more with a cell phone than simply make voice calls. When speaking of activating a top up, some industry representatives referred to this as “buying minutes”, and spoke of account balances as having a certain number of “minutes left”.

Today, activating a top up is not equivalent to “buying minutes”. If this were so, then the entire top up would have to be use solely for making calls. The consumer would not be able to use \$15 already spent on the purchase of minutes to also send texts, buy wallpapers, buy ringtones, buy music, etc. But as seen in the Virgin Mobile Canada quote, this is precisely what the wireless providers tell consumers they can do with their top ups – use it to select from the variety of goods and services offered by the service provider.

So what is going on here?

It would seem that while the industry is trying to win customers by telling them “top ups are credits which you can use to purchase a variety of goods and services at any time”, it is also trying to influence Commissioners to permit balance expiry by telling them “top up activation equates buying minutes for a time-limited period”.

¹² TNC CRTC 2012-557 Appendix D of the December 04, 2012 submission by the Public Interest Advocacy Centre (PIAC); Exhibits 1 and 3 of DiversityCanada's Presentation at the Hearing on February 13, 2013

¹³ TNC CRTC 2012-557, DiversityCanada Foundation Final Written Comments, written by Celia Sankar, pg 06 - 07

These statements can not both be true at the same time.

From the evidence I presented at the hearing and from other information available to Commissioners on the offerings from wireless providers, it should be abundantly clear that the activation of top ups can by no means be described as “buying minutes”.

35. As indicated in the previously-cited passages from decisions of the Supreme Court, the Commission was required to not just present its finding of fact, but reasons, that is to say, statements that showed the path it took through the conflicting evidence to come to the conclusion that prepaid wireless accounts do not hold cash balances, but, instead, hold unused minutes. This would have required that the principal evidence upon which that finding was based would be outlined. The reasons would have had to address the major points in issue. The reasoning process followed by the Commission would have had to be set out, and would have had to reflect consideration of the main relevant factors.
36. However, nothing in paragraph 349 or anywhere else in the Decision explains how or why the Commission concluded that prepaid wireless accounts hold unused minutes, rather than cash balances. There is an absence of reasons to explain this crucial finding of fact.
37. The second sentence of paragraph 349 states: “In this regard, the Commission notes that wireless services, including prepaid card services, provide access to the network for a specific period of time with specific usage limitations that are distinct for each aspect of the service.”
38. This, too, is a conclusion. Curiously, in this instance, the Decision presents a finding of fact which is based partially on an issue that was not in contention, and which is only vaguely related the real issue that was in dispute.
39. The CWTA elaborated on the second sentence of paragraph 349, stating: “This is a clear finding of fact, that all wireless services including pre-paid services provide on-going access to the WSPs’ networks while a customer’s account is open and valid.”

40. A scrupulous review of the record would show that there was no attempt by any consumer interest group to refute the fact that users of prepaid wireless services have access to the network after activating a top up.
41. However, what *was* contested was whether a prepaid wireless pay-per-use top up was:
- i) consideration for this access to the network, for specific usage during a specified period of time; or
 - ii) a deposit of cash, which would be used to purchase goods and services available *via the network*, and, thus, which should not be subject to an expiry date, since cash should not expire.
42. Again, using the aforementioned case law, the finding of fact in the second sentence of paragraph 349 should have been supported by statements showing the path taken through the conflicting evidence to come to this conclusion; a discussion of the principal evidence upon which this finding was based; statements that addressed the major points in issue; and a demonstration of the reasoning process followed by the Commission reflecting consideration of the main relevant factors.
43. It is submitted that the Decision could not present such information because there was no dispute during the Proceeding on the subject of whether prepaid services provide on-going access to the WSPs' networks while a customer's account is open and valid.
44. Furthermore, the second sentence of paragraph 349 is problematic because it presents a conclusion that quite likely cannot be reconciled with the one contained in the first sentence of paragraph 349. If prepaid wireless account hold "unused minutes", then what "specific usage limitations" are being referred to in the second sentence? Is the Decision suggesting that prepaid wireless top ups can only be used to make voice calls? Voice calls are charged by the minute. However, other services, such as text messages, for example, have a set fee. Additionally, unused minutes certainly cannot be used to purchase goods, such as ringtones, wallpapers, or games.
45. DiversityCanada is constrained to submit only that these two statements "quite likely" cannot be reconciled because the Decision does not provide an explanation (i.e. reasons) for these findings of fact that would clarify the matter.

46. The final sentence of paragraph 349 says: “The Commission considers that imposing a requirement that services be provided beyond the limitations set out in the service agreement would not be appropriate.”
47. Here again is a conclusion that invites conjecture on a number of issues. First, there is no explanation as to what service agreements the Decision is referring to. In its Final Written Comments¹⁴, DiversityCanada pointed out that prepaid wireless customers have an overarching agreement with the WSP by virtue of the WSP's terms of service, and, additionally, each top up payment creates a new agreement for that particular top up. Secondly, there is no explanation as to exactly what limitations are being referenced.
48. Presumably, the word “limitations” refers to the expiry dates. However, this conclusion by itself does not clarify how or why the Commission came to determine those expiry dates are valid and that it was, therefore, inappropriate to impose a requirement that services be provided beyond them.
49. There is nothing, for instance, to show how DiversityCanada's arguments about the illegality of the expiry dates had been weighed. In paragraphs 12 and 19 of its Final Reply, DiversityCanada said:

Defining characteristics of the pay-per-use arrangement are that customers pay for “usage” of the network or “access to the system” via the higher rates charged (as will be discussed later), and, they are not bound by any “usage period” (other than the illegal expiry dates that wireless providers purport their balances are subject to).

...

Furthermore, all provinces have banned the application of expiry dates to prepaid purchase cards, gift cards, vouchers, devices, electronic credits or other medium of exchange whereby customers pay an amount, up front, in order to later select from a variety of goods and services offered by the supplier – which precisely describes prepaid wireless top up purchases. All purported expiry dates on prepaid wireless top ups, therefore, are illegal.

14 At pages 3 and 6

50. If the Commission dismissed DiversityCanada's argument that expiry dates were illegal contractual terms that were therefore void, then on what basis did it do so? What evidence provided proof that the expiry dates on prepaid wireless account balances are legitimate? While the Decision asserted paramountcy over provincial law,¹⁵ what was the rationale for denying prepaid wireless consumers the protections they are entitled to under provincial law?
51. Reasons would have provided these answers.
52. In summary, DiversityCanada submits that there is an absence of reasons in the Decision, which raises substantial doubt as to the correctness of the Decision.

3.0 Evidence Ignored

3.0 a) Standard of Review

53. It is when discussing whether or not evidence has been ignored that an examination of the reasonableness of the Decision becomes relevant. As *Dunsmuir* states at paragraph 51: “questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness....”
54. *Dunsmuir* further specifies at paragraph 47:

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
[Emphasis added]

¹⁵ Para. 26 of the Decision. The legitimacy of this position was disputed by the Government of Quebec (as noted at para. 19 of the Decision) and, arguably, is subject to confirmation by the court.

3.0 b) Reasonableness of the Decision

55. DiversityCanada submits that the Decision is not reasonable since, as the following discussion shows, the outcome is essentially without foundation in the evidence.

56. In its Application, DiversityCanada asserted:

There is no evidence on the record of the Proceeding that WSPs present to consumers an offer for pay-per-use wireless services which specifies that consumers will pay all of the balance remaining on their account as consideration for “access to the network” after a set time period.

57. The CWTA sought to refute this assertion. Yet the CWTA could only come up with three contractual terms, from Bell, NorthernTel, and Rogers, which do not address the issue DiversityCanada raised.

58. As quoted by the CWTA, in its 15 March 2013 Reply, Bell said:

One intervener argued that consumers who top up their pay-per-use pre-paid accounts have not contractually consented to time-limited top ups and account balances. This is incorrect. As one example, Virgin Mobile's terms of use clearly advise about top up expiry:

“You must maintain a positive balance of funds in your Virgin Mobile account in order to use the Services. To add credit to your account you must "Top Up." If your account carries a zero dollar (\$0) credit balance for more than one hundred and twenty (120) consecutive days from the expiry of your last "Top Up" it will be closed and your telephone number will be reassigned. All Top Ups ... have specified active periods and an expiry date. The active period starts on the date you place the Top Up on your account. Any Top Up balance left on your account after the expiry date is forfeited and non-refundable. If you Top Up your account before your existing credit expires or is used up, then your existing credit is added to the New Top Up value and the active period of the earlier Top Up is extended so that the later expiry date of the two Top Ups is valid for the entire amount.”

From a customer information deficit standpoint, section D1.3 will fully address the concerns raised about pre-paid service by requiring the WSP to inform consumers at the time they enter their contract about the applicable pre-paid usage period and conditions applicable to their pre-paid balance and, by virtue of the application of section D1.2 to pre-paid, do so in plain language. No future regulation of pre-paid balances is required.

59. Bell's own introduction and commentary, and the quoted term of service itself indicate that this is evidence of very limited scope. It merely shows that Bell has a contractual term that purports to place expiry dates on prepaid wireless account balances, which DiversityCanada referred to as illegal.¹⁶ Thus, this evidence is no different from the top up cards and screen shots of phones that PIAC and DiversityCanada placed on the record, which show WSPs purport to place expiry dates on prepaid wireless account balances.
60. No part of the above-quoted passage supports the CWTA's suggestion that WSPs make offers to consumers whereby the cash balance remaining in their account is to be deemed as consideration for "access to the network".
61. In its introduction to the quote from NorthernTel's terms of service¹⁷, the CWTA acknowledged the narrow scope of its usefulness. The CWTA said: "Additionally, a discussion of the time-limited nature of top ups is found in the service agreement filed by NorthernTel..." A "discussion of the time-limited nature of top ups" does not qualify as proof that customers are explicitly informed that any remaining balance in the account on the purported expiry date will constitute a fee for accessing the network.
62. The CWTA went on, in footnote 5 of its Answer, to cite a number of other documents submitted by WSPs, as if to suggest they contained evidence that WSPs make an offer to consumers which explains that their unused cash balance will constitute payment for access to the network on the expiry date.
63. However, with one exception, all the references were to mere testimony, not evidence in the form of contracts or promotional material.

16 TNC CRTC 2012-557, DiversityCanada Foundation Final Reply, para. 12

17 Included in TNC CRTC 2012-557 November 20, 2012 Response from KMTS, NorthernTel and Télébec

64. The only contract referred to in the footnote was the one presented by Rogers in its 10 December Response, which says:

The following additional terms apply to prepaid Rogers wireless services:

- deposits into your account for prepaid Rogers wireless services are non-refundable;
- if you are entitled to a credit to your account, the credit will be valid only for a certain specified period following the initial activation of your Equipment to prepaid Rogers wireless services;
- we will deduct a 9-1-1 Emergency Access Fee for the provision of access to 9-1-1 service and any applicable 9-1-1 provincial government fee, once per month from your account (there is no airtime charge for calls made from your wireless device to 9-1-1); and
- if your account balance remains at 0 for 6 consecutive months or if required payments towards your account are not made or are returned, for any reason, your wireless identifier (e.g., telephone number or PIN number) will be deactivated.

65. As can be seen, this does not support that Rogers makes an offer to its prepaid pay-per-use customers stating that the remaining balance on a purported expiry date will constitute payment of a fee for access to the network.

66. It must be noted that neither the CWTA, nor DiversityCanada, nor any reviewing tribunal can state, as the CWTA seems to imply, that the Commission did indeed rely on the above-mentioned evidence from the WSPs. This again points to the absence of reasons in the Decision. Reasons would have noted what evidence the Commission relied upon to come to its finding of fact; the Decision, however, is bereft of any such information.

67. In attempting to refute DiversityCanada's assertion that the Decision ignores evidence, the CWTA highlights evidence that nevertheless demonstrates: i) that the WSPs refer to accounts holding funds, or dollar amounts, or deposits¹⁸, and ii) purport to apply expiry dates to top up payments. When the cash balances, funds, deposits or electronic credits “expire”, the amount is confiscated by the WSP. This evidence contradicts any suggestion that there is any agreement between the WSP and the prepaid pay-per-use customer that the customer will pay whatever amount remains in the account on a certain date as a fee for access to the network.

¹⁸ Use of the word “deposits” in the Rogers terms of service serves as further evidence that prepaid wireless accounts hold cash, rather than unused minutes. Customers can only deposit what they possess: they have cash to deposit into their accounts; they cannot deposit minutes into their account.

68. In summary, the record contains extensive evidence that prepaid wireless accounts are referred to by WSPs as holding cash balances, rather than unused minutes. Ample evidence was provided that WSPs tell consumers that their top ups are cash balances over which they have discretion; the significance of this being that for any funds to be legitimately deducted from an account balance, a customer would have to be made an offer for services or goods and would have to expressly accept such an offer. There is overwhelming evidence that WSPs purport to place expiry dates on these cash balances, which are confiscated on the purported expiry date; conversely, there is no evidence on the record that WSPs make any offer that states the remaining cash balance constitutes a fee for access to the network.
69. Cash should not expire; thus the present outcome (which allows for the expiry of cash balances in prepaid wireless accounts) is not defensible in respect of the facts presented during the Proceeding, and law.
70. DiversityCanada submits that any reviewing tribunal or court would find the Decision to be unreasonable on the basis of the evidence that was before the Commission.

4.0 Unjust Enrichment

4.0 a) Scope of the Proceeding

71. The CWTA submitted that DiversityCanada's third ground for its review and variance Application was without merit. The CWTA stated at paragraph 18 of its submission:

DiversityCanada's third argument is that the Commission committed an error of law by failing to consider DiversityCanada's unjust enrichment claims. This assertion is also incorrect. Furthermore, this issue was not among the issues on which the Commission requested comments. As the Commission stated in Telecom Notice of Consultation 2012-557, the purpose of the Wireless Code consultation was to determine the content of a wireless code, to whom it should apply, how it should be enforced, and how to assess the Code's effectiveness. As such, the issue of unjust enrichment was outside the scope of the proceeding.

72. DiversityCanada submits, however, that TNC 2012-557 quite explicitly placed unjust enrichment within the scope of the proceeding. Paragraph 15 of the Notice stated:

The Commission is of the preliminary view that the Wireless Code should address... (4) clarity of advertised prices, ... as set out in more detail below.

...

Clarity of advertised price

* a provision that addresses clarity of advertised prices of services included in a contract, such as monthly and one-time charges for mobile wireless services, including optional services, devices, data and roaming, and any associated fees.

** a provision that service providers may not charge consumers for optional mobile wireless services they have not ordered.*

[Emphasis added]

73. As pointed out in DiversityCanada's Application at paragraph 60, unjust enrichment occurs when there is “an enrichment, a corresponding deprivation, and the absence of any juristic reason—such as a contract or disposition of law—for the enrichment”. Charging for services that have not been ordered meets the definition of unjust enrichment.

74. On page 9 of its Final Written Comments, DiversityCanada stated:

No service provider on the market today makes any express offer to any prepaid customer (whether a pay-per-use customer or a time-plus-usage customer who makes an extra top up to purchase extra services) of “access to the network” to be paid for with the funds remaining from his or her top up payment.

If any service provider were to make the offer the industry described in its defence of balance expiry, this would be a curious package, indeed. What the industry has described in its defence is an “empty” access package. It is access with no services included. It is not a time-plus-usage package; the commodity described is strictly time on the wireless network. One wonders how many consumers in the economy-minded prepaid sector would actually accept such an offer when it could mean that, like Customer C, they would pay as much as \$15 for access with no usage included.

If the offer was never expressly made, it can not be said to have been accepted. It is simply not possible for a consumer to agree to purchase something which she does not even know is being offered.

No offer. No acceptance. Therefore, balance expiry can not be justified as payment of consideration for access to the service provider's system. The Commission must prohibit this practice.

...

The industry's argument is particularly of concern for the pay-per-use consumers, who are told by the industry from day one that they have total discretion in how they use their funds. Pay-per-use consumers have an expectation that they determine when and to what they apply their cash balance. If “access to the system” is offered as a commodity in and of itself requiring a separate payment (as opposed to being factored into the rates for pay-per-use services), then pay-per-use customers expect to also determine when and if they will purchase such a commodity.

In other words, these customers require an express offer for “access to the system” to be made, which they would expressly accept – if they wished to have it.

75. Then, on page 10 of its Final Written Comments, DiversityCanada raised the issue of unjust enrichment with respect to prior accumulated balances:

Service providers use balance expiry as a pretext to stretch their hands deep into consumers' accounts to confiscate funds that have nothing to do with the transaction bearing the expiry date.

In the example of Customer C, the expiry date relates to the \$15 top up purchased on January 1. On January 31, the entire balance of \$315 is seized. According to the industry's argument, the service provider claims \$15 for access to the system for the month. But what about the other \$300 in accumulated top up balances that was in Customer C's account? Is the industry claiming this sum is also consideration for access to the system during the month of January? Was there ever an offer of “empty” access to the wireless network for \$315 for a 30-day period, which the customer accepted?

76. DiversityCanada submits that this matter falls squarely within the framework of paragraph 15 of Telecom Notice of Consultation 2012-557.

4.0 b) Unjust and Unreasonable Rates

77. The Intervention by Vaxination Informatique (“Vaxination”) to DiversityCanada's Part I Application extends the argument that Section J allows unjust enrichment by putting the discussion in the context of the *Telecommunications Act*. DiversityCanada agrees with Vaxination's position that by allowing WSPs to charge indeterminate fees for services, Section J condones a breach of section 27 (1) of the *Act*. As Vaxination's examples show, the practice results in unjust and unreasonable rates, which can be \$100, or \$1,000, or any number.

78. During the Proceeding, DiversityCanada challenged the notion that WSPs incurred any significant cost for maintaining a wireless customer's account (that is, providing access to the network). At page 2 of its Intervention to TNC CRTC 2012-557, Appendix A: Interview with Dr. Keshav, DiversityCanada presented the following comment from its expert witness:

...there's absolutely no reason why a telecom provider couldn't keep these accounts at essentially no cost forever. The cost to maintain an account is too small to be measured. It would be a millionth of a cent, or something like that.

So any idea that is being put out that the providers, that it costs them something to maintain an account is, is ridiculous, you know. It flies against the face of everything we know in computer science, which is that costs are low and dropping fast, very, very fast, by a factor of about a hundred every two years.

79. Furthermore, DiversityCanada's Final Reply stated:

44. ... The truth is that wireless providers recover the cost for access to the system through the higher rates they charge prepaid, pay-per-use customers.

45. As seen in my Final Written Comments, Virgin's prepaid, pay-per-use customers are charged 35 cents per minute for calls. A Virgin customer on a prepaid monthly plan (who has unlimited evening and weekend and incoming calls) would have to be on the phone for **24 *days, non-stop*** to rack up the 35-cent charge a pay-per-use customer would incur in one minute.

46. The effective rate for the monthly plan customer is a hundredth of a cent per minute for voice calls, and the phone company is still able to make a profit. This example corroborates the arguments of the DiversityCanada Foundation's expert witness, Dr Srinivasan Keshav, Professor of Computer Science at the University of Waterloo and Holder of a Canada Research Chair in Tetherless Computing. Professor Keshav contended that the cost of keeping a prepaid customer on the wireless system was minuscule and, therefore, could not be used to justify balance expiry.

80. Thus, the seizing of prepaid wireless account balances that are significantly in excess of the actual cost to maintain an account would constitute an unjust and unreasonable charge that contravenes section 27 (1).
81. DiversityCanada supports the call Vaxination issued in paragraph 33 of its Intervention to this Application for the Commission to “use interrogatory powers to obtain from carriers revenues derived from the confiscation of pre-paid balances as well as the true cost of maintaining an inactive account”.

5.0 Undue and Unreasonable Disadvantage

82. Vaxination also raised the point that the charging of indeterminate fees results in an undue and unreasonable disadvantage to some consumers. Vaxination's examples illustrate the problem:

24. Consider the case of 2 users, one with a \$100.00 balance and the other with a \$5.00 balance. They are inactive, and the carrier confiscates their balance after one month to pay for account maintenance and closure. In one case, the user is charged \$100 while another user is charged \$5 despite both users having identical costs and handling by the carrier.

....

28. Taken to extreme, a customer who keeps a phone for emergency use only and diligently contributes to his pre-paid account every month for a few years may have accumulated a balance of \$1000 which would be confiscated if the customer misses just one month of payment. Meanwhile, a customer with a \$1 balance, gets no fee/confiscation he if adds \$10 to his balance.

83. As Vaxination rightly pointed out, this scenario contravenes section 27 (2) of the *Act*, which states that no Canadian carrier should subject any person to undue or unreasonable disadvantage.
84. DiversityCanada further notes that the undue and unreasonable disadvantage prepaid wireless pay-per-use customers are subjected to is not only in comparison to each other, but also with respect to customers who have prepaid wireless monthly plans. Such plans cost in the region of \$30 per month and allow consumers access to the network with unlimited or specified usage (100 voice minutes; 25 texts, for example). By contrast, according to their argument, through balance expiry, WSPs can charge prepaid wireless pay-per-use customers an unlimited dollar amount for simply accessing the network (that is to say, the fee would be for strictly time on the network, and not for any usage of specified services).
85. DiversityCanada submits there is no justification for charging varying fees to different customers in this situation. This requires that Section J of the Decision be reviewed and rescinded.

6.0 Expiry of Prepaid Wireless Cards

86. In its Answer to DiversityCanada's Application, at paragraphs 6 and 10, Sasktel claimed that its prepaid cards do not expire.¹⁹ However, Vaxination provides a comprehensive rebuttal to this line of argument.
87. In paragraphs 6 to 18 of its Intervention to this Part I Application, Vaxination expanded on a point alluded to by DiversityCanada at the Hearing:²⁰ that it is not the rectangular pieces of plastic known as prepaid wireless cards that are at issue, but, rather, the electronic credits held in prepaid wireless accounts that are of concern.

¹⁹ DiversityCanada notes that Sasktel's claims that it does not employ expiry dates, while not entirely relevant to this Part I Application, are interesting. First, the \$8.00 per month plan Sasktel referred to falls under a different business model to the one whereby WSPs apply an expiry date to account balances. Sasktel's plan has a minimum monthly spend, a system DiversityCanada objected to at paragraph 48 of its Final Reply in the Proceeding. Second, for its 60-day plan, Sasktel does not use the word "expiry" but its conduct is the same as that of every other WSP which explicitly states it applies expiry dates to account balances, i.e. Sasktel seizes the customer's unused funds on a certain date. Sasktel tells its customers: "If you fail to top-up your account every 60 days, you will lose any money currently in your account."

²⁰ TNC CRTC 2012-557 Transcript of Proceeding, Volume 3, 13 February 2013, at 5585

88. DiversityCanada fully agrees with Vaxination's position that, by referring to prepaid wireless cards, Section J is imprecisely worded and falls short of providing the protection the Commission intended, leaving out, as it does, consumers who top up online without a prepaid card.
89. Vaxination states that “the wording of section J cannot stand unchanged and ~~should~~ must be corrected to use proper terminology to correctly, precisely and accurately depict the protections the Commission intends to provide”.
90. DiversityCanada, however, maintains that Section J should be rescinded because it leaves intact a system that allows for expiry dates to be applied to the cash balances in prepaid wireless consumers' accounts.

7.0 Eligibility for Costs

91. In paragraphs 20 and 21 of its submission, the CWTA outlined its objections to DiversityCanada's request for a cost award:

DiversityCanada has submitted that the Commission: “Grant DiversityCanada's reasonable costs related to this application.” As this request does not follow the Commission's established processes for the awarding of either interim or final costs, as set out in sections 60-69 of the CRTC Rules of Practice and Procedure, and contains none of the supporting documentation that must accompany such a request, the CWTA submits that this request cannot be entertained.

Further, CWTA opposes any granting of costs to DiversityCanada with respect to this application on the grounds that it does not meet the criteria for cost awards. Specifically, the application does not “assist the Commission in developing a better understanding of the matters to be considered.” The very basis of DiversityCanada's application is to revisit matters on which the Commission has already demonstrated a clear understanding. Granting costs for an attempt to re-open decisions that DiversityCanada does not agree with would be tantamount to rewarding meritless review and vary applications. [Footnote marker deleted]

92. SaskTel indicated it was of the same mind as the CWTA.

93. First, to reply to the CWTA's comment on the absence of “supporting documentation that must accompany such a request”, DiversityCanada states simply that such documents were not required at the time of filing the review and vary application. DiversityCanada's final costs for participating in this proceeding cannot be known until the proceeding has finished. According to section 65 of the *Rules*, 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”. DiversityCanada intends to comply with these rules and submit its application for costs, along with the required documentation, at the appropriate time.
94. Second, to address the contention that this review and variance Application does not meet the criteria for an award of costs, DiversityCanada would like to refer the CWTA to precedents that confirm the validity of DiversityCanada's costs application.
95. As far back as February 2001, the Commission stated in Costs Order CRTC 2001-2 that it “considers that it has the power, pursuant to section 56 of the *Telecommunications Act*, to award costs not only to interveners in its proceedings (initiated by the Commission or otherwise), but also to an applicant”.
96. More to the point is Costs Order CRTC 2001-7, in which the Commission dealt with an application for costs by Action Réseau Consommateur (ARC) and the Association Coopérative d'économie familiale des Bois-Francs (ACEF-BF). At paragraph 5, the Commission stated:
- Typically, costs applications are filed by interveners to the proceeding. In this case, the Commission notes that the proceeding for which costs are sought was initiated by the applicant. Pursuant to section 56 of the *Telecommunications Act*, the Commission may award costs not only to interveners in its proceedings, but also to an applicant, such as ARC/ACEF-BF. In the circumstances, the general criteria and procedures in section 44(1) of the *Rules* remain appropriate.
97. The application in question filed by ARC/ACEF-BF was an “Application to review and vary Order CRTC 2000-531: Télébec ltée – Rate restructuring”.
98. This position was further confirmed in January of 2004 with Telecom Costs Order CRTC 2004-2, which stated in paragraph 21:

The Commission considers that the power under section 56 of the Act gives it wide discretion to award costs: (i) in relation to any proceeding before it, which includes Part VII proceedings and adversarial proceedings; and (ii) to be paid to persons other than interveners, which includes parties who initiate Part VII proceedings. The Commission has in the past awarded costs to an applicant who initiated a Part VII proceeding, pursuant to section 56 of the Act.

[Footnote marker omitted]

99. With the coming into force of *Canadian Radio-television and Telecommunications Commission Rules of Practice and Procedure (SOR/2010-277)*, review and variance applications that used to be filed as Part VII are processed as Part 1 applications. And since there has been neither a revision of section 56 of the *Telecommunications Act*, nor a new decision by the Commission overturning the above-mentioned costs orders, then it still stands that costs may be awarded to the initiator of a proceeding to review and vary a decision by the Commission.

100. DiversityCanada submits that the CWTA has not substantiated its case to the Commission in its objection to costs for DiversityCanada's submitted position.

8.0 Conclusions

101. DiversityCanada submits that nothing in the Answers submitted by the respondents diminishes any aspect of DiversityCanada's Part 1 Application. DiversityCanada respectfully submits that quite the contrary is true: the case law cited and the evidence the respondents referenced pointed to the validity of DiversityCanada's assertions.

102. Furthermore, the Intervention by Vaxination presented further cogent arguments that strengthen the position that Section J should not stand.

103. Throughout the Proceeding, DiversityCanada sought to bring attention to the fact that prepaid wireless account balance expiry harms the most vulnerable in society, including pensioners, persons receiving disability benefits, youth, minimum-wage workers, the unemployed, and newcomers to Canada. These are individuals who can least afford to have their already limited funds taken from them, or have their wireless service cut off. On behalf of these individuals, DiversityCanada respectfully urges the Commission to grant the requests contained in its Part 1 Application.

9.0 List of Parties Served

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