

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

**PURSUANT TO PART I  
OF THE CRTC RULES OF PRACTICE AND PROCEDURE  
AND SECTIONS 24, 27, 47, 56 AND 62  
OF THE *TELECOMMUNICATIONS ACT***

**TO REVIEW AND VARY  
TELECOM DECISION CRTC 2015-211**

**(The DiversityCanada Foundation and  
the National Pensioners Federation -  
Application seeking relief for  
wireless customers affected by  
TELUS Communications Company's  
Large Prepaid Balance Policy)**

**REPLY**

**13 OCTOBER 2015**

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## 1.0 Executive Summary

- 1) The DiversityCanada Foundation (“DiversityCanada”) and the National Pensioners Federation (“NPF”) file this Reply in the proceeding initiated by the Part I Application filed by DiversityCanada/NPF 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 Telecom Decision CRTC 2015-211 (“the Decision”).
- 2) DiversityCanada/NPF are in receipt of an Answer submitted on 17 September 2015, by Telus Communications Company (“Telus”) as well as four Interventions submitted by various interveners. In this Reply, DiversityCanada/NPF addresses aspects of Telus' Answer. DiversityCanada/NPF respectfully submit that not addressing a particular aspect of Telus' submissions or those of the interveners does not indicate agreement with that position.
- 3) In its Answer, Telus suggested that the Decision did not make a finding of fact that Telus' terms of service entitled the company to change the nature of the payment arrangement from one on a pay-per-use basis to one requiring the acquisition of monthly plans.
- 4) DiversityCanada/NPF submit that a reading of paragraph 16 of the Decision shows that the Commission did indeed make a finding of fact that Telus' terms of service entitled the company to change the nature of the payment arrangement from one on a pay-per-use basis to one requiring the acquisition of monthly plans. DiversityCanada/NPF therefore submit that Telus' contention is without merit and should be ignored.
- 5) DiversityCanada/NPF submit that in the Answer, Telus made numerous vague, confusing, and inaccurate statements to suggest that the prepaid wireless service contract expires upon the advent of the expiry date of the most recent top-up and therefore consumers entered into a new contract that covered the prior accumulated credits when they topped up after 20 October 2013, and consequently no consent was required.
- 6) DiversityCanada/NPF respectfully submit that in order to come to a determination as to whether there was an existing contract that was amended without consent, the Commission was required to examine the meaning and effect of the following words in the contract: “unused credits for pay-per-use services will carry over”.
- 7) DiversityCanada/NPF submit that such an examination would show that – contrary to Telus' contention that the contracts for balances over \$300 accumulated prior to 20 October 2013 had extinguished – none of the characteristics of a contract that is extinguished, expired, discharged or that ceases to exist are present.
- 8) Furthermore, DiversityCanada/NPF submit that when consumers top up, only the value of a new top-up is handed over by consumers to Telus as consideration for that top-up. Therefore, only the value of the new top-up can be subject to the terms in place at the time the new top-up is made.

- 9) DiversityCanada/NPF submit that the courts have ruled that when considering a matter involving a contract dispute, a decision-maker is required to first examine the agreement itself so as to ascertain the intentions of the parties at the time the contract was formed in order to give effect to those intentions. The court has said that the decision-maker should look to extrinsic material for assistance in interpreting an agreement only if a thorough examination of the agreement itself fails to clarify the intentions of the parties.
- 10) DiversityCanada/NPF submit that the court has also stated that extrinsic evidence which the law permits to be considered in order to assist in the interpretation of a contract between parties consists of “evidence of their conduct in making their agreement and in fulfilling their obligations.” DiversityCanada/NPF respectfully submit that the Decision went outside of these boundaries when it used the Wireless Code as extrinsic evidence to interpret the prepaid wireless contract between Telus and its customers, and that this error in law requires that the Decision be overturned.
- 11) DiversityCanada/NPF further submit that the reliance on Section D1 of the Wireless Code renders the Decision reversible as this clause is invalid with respect to prepaid wireless consumers. DiversityCanada/NPF submit that Section D1 created an unintended consequence: it ostensibly removed certainty for prepaid wireless consumers that key contract terms and conditions will not change without their express consent during the commitment period.
- 12) DiversityCanada/NPF respectfully submit that Section D1 has the unintended consequence of breaching basic principles of contract law; and that the Commission erred in declaring that certain consumer contracts are subject to unilateral change without consent. DiversityCanada/NPF therefore submit that the Decision must be overturned.
- 13) In its Answer, Telus argued that the Commission had conducted the proper test when it concluded that there was no economic duress. Telus sought to make a distinction between two leading judgements on economic duress which DiversityCanada/NPF had brought to the Commission's attention in the original Part I proceeding. Telus then sought to argue that one of the judgements, *Byle v Byle*, which included a threat of physical harm, was not relevant and need not have been considered by the Commission.
- 14) DiversityCanada/NPF submit that the courts have ruled that there is no distinction between the two leading authorities and that the courts have relied on the *Byle* ruling when considering matters involving economic duress. DiversityCanada/NPF thus submit that contrary to Telus' contention, DiversityCanada/NPF's submissions with respect to *Byle* were relevant and properly raised before the Commission.
- 15) Furthermore, DiversityCanada/NPF submit that the Decision's failure to apply the proper test to determine whether there was duress was an error in law which requires that the Decision be overturned.
- 16) In its Answer, Telus mischaracterized DiversityCanada/NPF's argument with respect to the Commission's determination that there was no unjust discrimination. Telus built an argument and cited judgements related to the provision of “sufficient reasons,” the “adequacy of reasons,”

and the “quality of reasons.” DiversityCanada/NPF submit that Telus' submission on this issue should be ignored as Telus focuses on an argument that was not raised in this Part I review and vary Application.

- 17) Contrary to Telus' claim, DiversityCanada/NPF submitted that the Commission failed to provide any reason for its conclusion on the issue of unjust discrimination, even though there is a statutory requirement for the Commission to provide reasons.
- 18) DiversityCanada/NPF submit that the Supreme Court of Canada has ruled that the failure to provide reasons where reasons are required is a breach of procedural fairness that renders a decision reversible. Additionally, DiversityCanada/NPF submit that in recent judgements, the courts have i) quashed a decision for the lack of reasons as, similar to the Decision, the lower court provided only a decision or conclusion but failed to provide reasons for the decision; and ii) overturned a decision because the decision-maker failed to provide reasons and the record offered no assistance in discerning what the reasoning process entailed. DiversityCanada/NPF submit that the Decision should be similarly overturned.
- 19) In its Answer, Telus argued there was no basis for DiversityCanada/NPF's position that the Decision was contrary to s. 7 of the Act since there was no validity to DiversityCanada/NPF's submission that Telus operated under invalid agreements, Telus subjected consumers to duress, and Telus made material changes to consumer contacts without consent.
- 20) DiversityCanada/NPF submit that this Reply rebuts Telus' arguments on all three points and demonstrates that Telus did indeed operate under invalid agreements; subject consumers to duress; and make material changes to consumer contacts without consent.
- 21) In its Answer, Telus also referred to statements made by the Commission and the Governor in Council in response to review and vary applications by DiversityCanada/NPF and noted that these entities stated that the Wireless Code's findings about balance expiry for prepaid wireless services were consistent with the policy objectives of the Act.
- 22) DiversityCanada/NPF submit that the present proceeding is concerned solely with prepaid credits which are not seized, and which, consequently, do not expire on an expiry date, but, instead, are “carried over”. Thus Telus' reference to statements by the Commission and the Governor in Council concerning balances subject to seizure are irrelevant and should be ignored.
- 23) For all the above reasons, DiversityCanada/NPF respectfully submit that Telus' objections to this review and vary application should be ignored and the application should be allowed.
- 24) DiversityCanada/NPF submit that an examination of the contract for prepaid wireless services is sufficient to persuade the Commission that the agreement provided that when consumers met the obligation to top up before the expiry date, their prior accumulated prepaid credits would be carried over, and thus would not expire, and neither would the contracts under which those credits were acquired. Therefore, DiversityCanada/NPF submit that the Commission should find that Telus was required to obtain valid consent to amend the existing contract in order to

introduce its Large Balance Policy and failed to do so.

- 25) Alternatively, DiversityCanada/NPF submit that should the Commission be persuaded by Telus' arguments, at best, the agreement must be deemed ambiguous, given the evidence and arguments presented by DiversityCanada/NPF that when credits are carried over neither the credits nor the contracts under which they were acquired expire.
- 26) In such a scenario, DiversityCanada/NPF submit that paragraph 387 of Telecom Regulatory Policy CRTC 2013-271 (the language of which was incorporated into the Wireless Code) provides clear and unequivocal direction that the matter should be decided "in a manner that is favourable to the consumer."
- 27) DiversityCanada/NPF therefore respectfully submit that the Decision should be overturned and the relief requested in the original Part I Application should be provided.

## 2.0 Entitlement to change contractual terms

**ISSUE 1)** *Did the Commission make an erroneous finding of fact that Telus' terms of service entitled it to change the nature of the payment arrangement from one on a pay-per-use basis to one requiring the acquisition of monthly plans?*

- 28) In its Answer, Telus suggested that the Decision did not make a finding of fact that Telus' terms of service entitled the company to change the nature of the payment arrangement from one on a pay-per-use basis to one requiring the acquisition of monthly plans. Telus stated:<sup>1</sup>

In particular, DiversityCanada's position that the Commission made an erroneous finding of fact that TELUS' terms of service entitled it to change the nature of the prepaid services arrangement is an argument that is only relevant if the Commission did indeed make a finding that a contract amendment is in play.

- 29) DiversityCanada/NPF submit that Telus' contention is without merit and should be ignored.
- 30) DiversityCanada/NPF submit that a reading of paragraph 16 of the Decision shows that the Commission did indeed make a finding of fact that Telus' terms of service entitled the company to change the nature of the payment arrangement from one on a pay-per-use basis to one requiring the acquisition of monthly plans. That paragraph says:

TCC's introduction of the policy did not place affected customers under economic pressure. TCC's terms of service acknowledge the possibility of the WSP making changes to the terms of its prepaid contracts. Furthermore, TCC provided advance notice of the policy's introduction and only applied the policy to individual customers upon their first "top-up" after the 20 October 2013 introduction of the policy. [Emphasis added]

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1 Telus Answer, dated 17 September, 2015; para. 13

- 31) This paragraph makes it clear that the Decision is referring to Telus' terms of service, ie "TCC's terms of service".<sup>2</sup>
- 32) The Decision outlines the finding of fact that Telus' terms of service acknowledge the possibility of Telus *making changes to the terms* of its prepaid contracts. In other words, the Decision made the finding of fact that Telus' terms of service entitled Telus to change the terms of the prepaid contract.
- 33) This paragraph makes it clear that the terms being discussed are the terms of Telus' prepaid contracts that were introduced after 20 October 2013.
- 34) The terms in Telus' prepaid contracts that were introduced after 20 October 2013 stated that balances over \$300 (which had been accumulated prior to 20 October 2013) would now be subject to monthly plans; this represented a change to the terms which, prior to 20 October 2013, stated that those accumulated balances were to be used on a pay-per-use payment basis.
- 35) DiversityCanada/NPF submit, therefore, that paragraph 16 of the Decision shows that the Commission made a finding of fact that Telus' terms of service entitled the company to change the nature of the payment arrangement from one on a pay-per-use basis to one requiring the acquisition of monthly plans.
- 36) DiversityCanada/NPF submit that the record of the original Part I Application (8665-D53-201406877) would show that the Commission was provided with evidence and arguments by both parties of only one term in Telus' terms of service that acknowledged the possibility of the WSP making changes: that term stated Telus could make changes to the *rates* it charges for prepaid wireless services..
- 37) DiversityCanada/NPF submit that there is nothing on the record of 8665-D53-201406877 that supports a finding of fact that Telus' terms of services acknowledge the possibility of the WSP making changes to the *terms* of its prepaid contracts in general, or, in particular, changes of the nature that consumers were subjected to upon the 20 October 2013 introduction of Telus' Large Balance Policy.
- 38) DiversityCanada/NPF therefore submit that the finding in paragraph 16 of the Decision that Telus' terms of service entitled Telus to change the terms of the prepaid contract (from a payment arrangement on a pay-per-use basis to one requiring the acquisition of monthly plans) is erroneous.
- 39) As such, DiversityCanada/NPF submit that the test for an application brought under s. 62 of the Act has been met and the Decision should be overturned.

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2 TCC is the acronym for Telus Telecommunications Company.

### 3.0 The Test for the Requirement of Consent

**ISSUE II)** *Did the Commission fail to apply the proper test to determine whether there was an existing contract which required Telus to obtain consent in order to make a material change?*

40) DiversityCanada/NPF note that the salient points on this issue in the Part I review and vary Application are that:

\*the Decision failed to apply the proper test to determine whether there was an existing contract which required Telus to obtain consent in order to make a material change;

\*such a test would have required the Commission to examine the offer that was made by Telus and accepted by consumers;

\* the examination would necessarily have included inquiring into the circumstances required for the contract to be considered extinguished;

\* the examination would have also included DiversityCanada/NPF's submission that only the value of a new top-up forms consideration for a new service period and balances accumulated prior to 20 October 2013 could not be subject to terms of the contract introduced after that date;

\* the section of the Wireless Code on which the Decision relied is invalid as that section oversteps the Commission's legal authority and abrogates prepaid wireless consumers' fundamental right to not have key terms of their contract changed without their consent.

41) DiversityCanada/NPF submit that in its Answer, Telus failed to address the issue raised in the Part I review and vary Application, namely, what is the proper test to determine whether there was an existing contract which required Telus to obtain consent in order to make a material change, and did the Decision fail to apply the proper test.

42) DiversityCanada/NPF submit that in its Answer, Telus made numerous vague, confusing, and inaccurate statements about the nature of prepaid wireless contracts and argued by inference that the Commission's findings in the Wireless Code decision removed the necessity to examine the subject contract in the original Part I proceeding.<sup>3</sup>

43) In section 3.1, DiversityCanada/NPF describe the subject agreement of this proceeding.

44) In section 3.2, DiversityCanada/NPF analyze and address a representative sample of vague, confusing, and inaccurate statements made by Telus with respect to the subject agreement of this proceeding.

45) In section 3.3, DiversityCanada/NPF demonstrate why the approach Telus suggested was not necessary (ie basing the analysis of the issue on the actual contract) was, in fact, required.

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3 Telus Answer, dated 17 September 2015, paras. 9 to 14

46) And in section 3.4, DiversityCanada/NPF demonstrate why the approach put forward by Telus (ie basing the analysis of the issue on the Wireless Code instead of the actual contract) was incorrect.

### 3.1 The Subject Agreement of this Proceeding

47) In the Answer dated 17 September 2015, Telus made numerous vague, confusing, and inaccurate statements to suggest that the prepaid wireless service contract which is the subject of this proceeding expires upon the advent of the expiry date of the most recent top-up.

48) DiversityCanada/NPF submit that in order to untangle the confusion, it is necessary to look at the actual terms of the agreement between Telus and its prepaid wireless customers.

49) At the second paragraph of its 05 September 2014 Answer to the original Part I Application (8665-D53-201406877), Telus provided the following terms of service for its prepaid wireless services, and noted that only the fourth bullet was new:

- Rates for prepaid service may change without notice.
- *Prepaid service credits are valid for a fixed period of time from the day they are activated (thirty days unless another period of time is indicated on your prepaid card or receipt).*
- *Unused credits for pay-per-use services will carry over if you top up your account with additional credits or purchase a rate plan or add on within seven days after the end of the service period. For prepaid rate plans or add-ons, any included minutes, messages or data will not carry over.*
- If the credits on your prepaid account are \$300 or more, and you do not subscribe to a thirty day rate plan, our least expensive thirty day rate plan that includes voice and messaging services will automatically be added to your account.
- Prepaid service credits are non-refundable. After ninety days with a zero balance, your account will be automatically deactivated.

[Emphasis added by DiversityCanada/NPF]

50) The second bullet is the term that establishes that prepaid wireless credits are subject to expiry dates.

51) The third bullet establishes two different treatments for prepaid credits based on whether consumers meet an obligation to top up their account with additional credits before the expiry date associated with the most recent top-up:

**Seized Prepaid Credits:** If consumers do not top up their account with additional credits, the balance in the account “expires” and Telus seizes the accumulated prepaid credits;<sup>4</sup>

**Prepaid Credits Carried Over:** If consumers top-up their account with additional credits, the balance in the account *does not expire* and the *“unused credits for pay-per-use services will carry over”*.

- 52) The original Part I Application was brought with respect to solely prepaid credits that do not expire and that are “carried over”.
- 53) DiversityCanada/NPF highlight that Telus' terms of service quoted above speak only of the expiry of “prepaid service credits” or simply “credits”. The terms of service contain no provision that the agreement under which consumers acquire prepaid service credits is subject to expiry.
- 54) DiversityCanada/NPF respectfully submit that in order to come to a determination as to whether there was an existing contract that was amended without consent, the Commission was required to examine the meaning and effect of the following words in the contract: *“unused credits for pay-per-use services will carry over”*.
- 55) DiversityCanada/NPF submit that such an examination would show that – contrary to Telus' contention that the contracts for balances over \$300 accumulated prior to 20 October 2013 had extinguished<sup>5</sup> – none of the characteristics of a contract that is extinguished, expired, discharged or that ceases to exist are present.<sup>6</sup>
- 56) Specifically, upon the advent of the expiry date of the most recent top-up, if consumers meet the obligation to acquire additional top-ups then:
- \* consumers do not give up their claims to receive prepaid wireless service in exchange for the prior accumulated credits; and
  - \* Telus is not released from its obligation to provide prepaid services for the prior accumulated credits that it holds.
- 57) Instead, when the balance is “carried over”
- \* consumers continue to have claims to receive prepaid wireless service in exchange for the prior accumulated credits; and
  - \* Telus remains under obligation to provide prepaid services for the prior accumulated credits that it holds.
- 58) Furthermore, DiversityCanada/NPF respectfully submit that the only manner in which the

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before the Commission and the Governor in Council and the matter is live and subject to further review.

5 Telus Answer dated 05 September 2014, para. 25 to 27 (This document was included as an Attachment to Telus' 17 September 2015 Answer).

6 *C & M Farms Ltd. v. Rottacker Farms Ltd.*, 1976 ALTASCAD 158 (CanLII), para. 16; *Jedfro Investments (U.S.A.) Ltd. v. Jacyk*, [2007] 3 SCR 679, 2007 SCC 55 (CanLII), (“*Jedfro Investments*”) para. 14

contract for prepaid credits that are carried over could cease to exist would be if there was an explicit agreement between the parties that when consumers top up before the expiry date, the contract under which the prior accumulated credits were acquired would also expire.

- 59) This point is made clear in *Jedfro Investments* (cited in footnote 5), in which the court, speaking of the joint venture agreement<sup>7</sup> in the case, states at paragraph 16:

In order to discharge the joint venture agreement, a new agreement that it be terminated must be established. The facts as found by the trial judge do not support the conclusion that the parties had reached a new agreement to terminate the joint venture agreement.  
[Emphasis added]

- 60) DiversityCanada/NPF submit that Telus failed to show any evidence that there was any offer and acceptance of any new agreement between itself and consumers that the contract under which consumers acquired prior accumulated credits would be terminated in the scenario where consumers topped up before the current expiry date and the credits were carried over.
- 61) Furthermore, for a new contract for the prior accumulated balances to be established, all the elements of a contract had to be present. The court stated at paragraph 16 of *Jedfro Investments*:

To establish a new agreement it must be shown that there was an offer by one party, accepted by the other, or an exchange of promises, supported by consideration. There must be a meeting of the minds on the essential terms— in this case the ending of the joint venture agreement. There is no evidence that the parties ever arrived at a concluded agreement to end the joint venture agreement.

- 62) DiversityCanada/NPF submit that although Telus contended (as described in section 3.2) that the prior accumulated balances operate under a new agreement at the advent of every expiry date, Telus provided no evidence that it made an offer that was accepted by consumers and supported by consideration by which credits that were carried over came to operate under a new contract.
- 63) DiversityCanada/NPF further submit that when consumers top up, only the value of a new top-up is handed over by consumers to Telus as consideration for that top-up. Therefore, only the value of the new top-up can be subject to the terms in place at the time that new top-up is made.
- 64) DiversityCanada/NPF submit that when prior accumulated balances are carried over, that is to say when the “life” of these balances is extended, they cannot be subject to any new contract as they were already handed over as consideration for the contracts that were in place at the time these prior top-ups were made. The effect of these balances being carried over is that the life of contracts under which they were handed over to Telus as consideration is also extended.
- 65) In light of the above, DiversityCanada/NPF now analyzes a representative sample of the vague, confusing, and inaccurate statements found in Telus' Answer concerning the expiration of prepaid wireless contracts.

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<sup>7</sup> DiversityCanada/NPF note that while *Jedfro Investments* involved a joint venture agreement, the court made it clear at paragraph 14 of the judgement that the principles discussed applied to all contracts.

### 3.2 Telus' Erroneous Statements about the Subject Agreement of this Proceeding

- 66) Except where otherwise noted, the emphasis has been added by DiversityCanada/NPF to the passages quoted from Telus' Answer
- 67) **Paragraph 5:** “In particular, in response to issues (1) and (2), DiversityCanada has failed to apprehend that the Commission found that *prepaid credits are subject to expiry, meaning that at the end of the prepaid period, the contract has run its course*, and therefore, there is no amendment to an existing contract when prepaid customers have their prepaid balance applied to a monthly prepaid plan.”
- 68) **Analysis:** First, as shown above, the credits that are the subject of this proceeding are those that are carried over. These credits do not expire because consumers meet the obligation to top up before the expiry date of the most recent top-up precisely to prevent the expiry of these credits.
- 69) Second, Telus fails to make the distinction between prepaid credits and prepaid contracts. They are not one and the same and the terms are not interchangeable. Consumers enter into a contract to acquire credits and to use these credits to purchase prepaid wireless services. Under these contracts, Telus makes a promise to hold these credits and to provide services in exchange for them when consumers decided to make use of the wireless services.
- 70) Third, the fact that prepaid credits are subject to expiry does not necessarily mean that at the end of the service period the contract has run its course. This only holds if the consumer does not top up before the expiry date of the most recent top-up and Telus seizes the balance. When Telus seizes the balance, it claims to put an end to consumers' rights to claim services and to its obligation to provide services. Thus, the expiry of credits results in the extinguishment, discharge, expiry or cessation of the contract.<sup>8</sup>
- 71) DiversityCanada/NPF submit, however, that as shown above, where consumers meet the obligation to top up before the expiry date of the most recent top-up, the prepaid credits do not expire, nor does the contract expire as consumers retain their rights to claim services for these credits and Telus remains under an obligation to provide wireless services in exchange for these credits.
- 72) **Paragraph 9:** “More importantly, DiversityCanada’s claims revolve on its willful blindness to the entire factual and legal underpinning of prepaid services – the fact that the Commission has already ruled that *prepaid wireless services are subject to expiry dates*. Prepaid expiry causes a fundamental legal consequence because *when an expiry date is reached, the existing contract has run its course*. The customer is entitled to purchase prepaid wireless services, but only at the terms and conditions that are being offered at the time of purchase. *This means that no contract is being amended. The original contract has completed and the customer chooses whether to obtain prepaid wireless services at the terms and conditions being offered at the time.*”

- 73) **Analysis:** Telus' statement that “when an expiry date is reached, the existing contract has run its course” holds true only for credits subject to seizure. Where no additional top-up is made by the consumer, Telus seizes the balance, thus putting an end to consumers' rights to claim services and to its obligation to provide services.
- 74) The statement that “when an expiry date is reached, the existing contract has run its course” does not hold true for prepaid credits that are carried over or the contracts under which these credits were acquired. Since consumers meet the obligation to top up before the expiry date, neither their credits nor the contracts (under which these credits were acquired) expire.
- 75) Since the contracts under which these accumulated balances were still in existence Telus, required the consent of consumers in order to amend the terms to apply its Large Balance Policy with respect to those prior accumulated balances.
- 76) Telus' statement that “the customer chooses whether to obtain prepaid wireless services at the terms and conditions being offered at the time” is true. However, the new terms apply strictly to the value of new top-ups that consumers hand over as consideration for the prepaid credits that are acquired in that new transaction. The new terms and conditions being offered cannot be applied to the prior accumulated balance as the prior accumulated balance does not change hands as consideration to form the agreement under the new contract.
- 77) **Paragraph 12:** “The Commission’s determinations make clear that it accepted TELUS’ position about the contract principles associated with the Large Prepaid Balance policy. In TELUS’ Answer to the original application, the Company pointed out the nature of prepaid services and the fact that any customer affected by the Large Prepaid Balance policy was not subject to ***contract*** amendment. For any customer with a large prepaid balance, *the pay-as-you-go prepaid services* have run their course and expired. Upon expiry, the customer then has the option to accept TELUS’ offer to move to the monthly prepaid services plan.”
- 78) **Analysis:** Telus misuses the terminology. The terms of service clearly state that is the prepaid credits that are subject to expiry. There is no provision that the contracts are subject to expiry. And, as demonstrated above, the credits that are the subject of this proceeding do not expire. As these credits do not expire, the contracts under which they were acquired remain in existence. Any change in the key terms with respect to these prior accumulated credits by Telus is an amendment to the original contracts under which they were acquired, which remain in existence.
- 79) In conclusion, DiversityCanada/NPF submit that Telus presented vague, confusing and inaccurate statements about the contracts that are the subject of this proceeding. DiversityCanada/NPF therefore submit that Telus' statements should be ignored.

### 3.3 The Required Approach

- 80) DiversityCanada/NPF submit that the original Part I Application brought a *contract dispute* before the Commission. Consumers had entered into an agreement for prepaid wireless services with Telus and DiversityCanada/NPF complained that Telus changed the contract without the consent of its customers.
- 81) DiversityCanada/NPF submit that at paragraphs 20 to 26 of *BC Rail Partnership v Standard Car Truck Company*,<sup>9</sup> the court set out the required approach when a decision-maker is considering a contract dispute. The decision-maker is required to first examine the agreement itself so as to ascertain the intentions of the parties at the time the contract was formed in order to give effect to those intentions. The decision-maker should look to extrinsic material for assistance in interpreting an agreement only if a thorough examination of the agreement itself fails to clarify the intentions of the parties. The extrinsic material that is admissible pertains to the conduct and statements of the parties, prior to, contemporaneous with, and subsequent to the making of the contract.
- 82) This was also highlighted in *Water Street Pictures Ltd. v. Forefront Releasing Inc.*:<sup>10</sup>

[23] Recourse to extrinsic evidence to aid in the interpretation of an agreement is the court's last resort. It is only when the intentions of the parties cannot be objectively determined from the words they have chosen to employ, such that there is ambiguity, that the law permits consideration to be given to evidence of their conduct in making their agreement and in fulfilling their obligations. If it were otherwise, the certainty that is essential to documenting commercial transactions would be seriously undermined. The two-step approach to be taken has been succinctly stated by the Manitoba Court of Appeal in *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League*, [2003] 9 W.W.R. 385, 2003 MBCA 71 (CanLII) at para. 26:

[26] In brief summary then, to determine the intentions of the parties expressed in a written contract, one looks to the text of the contract as a whole. In doing so, meaning is given to all of the words in the text, if possible, and the absence of words may also be considered. If necessary, the text is considered in light of the surrounding circumstances as at the time of execution of the contract. The goal is to determine the objective intentions of the parties in the sense of a reasonable person in the context of those surrounding circumstances and not the subjective intentions of the parties. If, after that analysis, the text in question is ambiguous, extrinsic evidence may be considered.

[24] Thus, the court looks first to the words of the agreement, read as a whole, aided, if necessary, by evidence of the circumstances or what is referred to as the factual matrix existing when the agreement was made....

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9 2009 NSSC 240 (CanLII)

10 2006 BCCA 459 (CanLII) ("*Water Street Pictures*")

83) In *Campbell v. Campbell*,<sup>11</sup> the court determined that it was an error in law for a lower court to have ignored a written agreement between two parties and to have used extrinsic material in the form of common law principles or a statute for the purpose of interpreting a contract. As the basis of the lower court's decision is nearly identical to the basis of the Commission's Decision, this ruling is worth quoting at length:

[34] Turning next to the substantive issues on appeal, the trial judge framed his analysis in terms of whether the relationship of the parties met the common law definition of common-law marriage or cohabitation. He used the terms “common-law marriage” and “marriage-like relationship” more or less synonymously. The judge conducted a thorough analysis of the evidence and the authorities on the point in order to reach the conclusion that the parties were living in a common-law relationship as at January 2004. He did not squarely address the question of the contractual meaning of the term “cohabitation”, as it was used in para. 9 of the Agreement. As I explain below, the contract governed the relationship between the parties and the judge erred in ascribing a common law interpretation of the term without considering its meaning within the context of the Marriage Agreement. ...

[39] The appellant cites *Athwal v. Black Top Cabs, Ltd.*, [2012 BCCA 107 \(CanLII\)](#) at paras.42-44, 30 B.C.L.R. (5th) 17 in his factum for the proposition that a contract should be interpreted by construing its plain and ordinary language within the meaning of the contract as a whole. The text of the contract may be considered in light of the surrounding circumstances in order to ascertain the objective intentions of the parties, but not so as to contradict the plain meaning of the contract as D. Smith J.A. stated for the Court:

“(i) *The principles of contractual interpretation*

42 The contractual intent of parties to a written contract is objectively determined by construing the plain and ordinary meaning of the words of the contract in the context of the contract as a whole and the surrounding circumstances (or factual matrix) that existed at the time the contract was made, unless to do so would result in an absurdity. Where the language of a contract is not ambiguous (that is, when viewed objectively it raises only one reasonable interpretation), the words of the written contract are presumed to reflect the parties’ intention. An interpretation that renders one or more of the contract’s provisions ineffective will be rejected.

43 Extrinsic evidence to explain the meaning of an unambiguous contractual provision is not admissible. Evidence of a party’s subjective intention in executing the contract, or of their understanding of the meaning of the words used in the contract, is not admissible to vary, modify, add to or contradict the express words of the written contract. ...

[40] The respondent argues in his factum:

As noted previously, in his reasons for judgment, rather than apply these contractual principles as to the proper interpretation of clause 9 of the Agreement, the learned trial judge determined the meaning of this clause by focussing on whether or not the parties were in a “marriage-like” relationship, as that term is used in various statutes in British Columbia, including the [Family Relations Act, RSBC 1996 c.128](#).

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11 2013 BCCA 109 (CanLII) (“*Campbell*”)

This term has been the subject of numerous decisions of this court interpreting this statutory provision, and the Appellant submits the applicable principles of statutory interpretation are manifestly distinct from those of contractual interpretation: see, for example, *Austin v Goerz*, [2007 BCCA 586 \(CanLII\)](#), at para 19 - 21: ...

[41] I agree with the appellant's argument. In my view, the judge erred in failing to interpret the language of the contract having regard to the contract as a whole. Instead, he plucked the words from the contract and gave them a common-law or statutory meaning....

84) DiversityCanada/NPF respectfully submit that it is similarly an error for the Decision to have i) failed to examine and interpret the language of the contract between Telus and its prepaid wireless customers; and ii) to have interpreted the findings of the Wireless Code as if they constituted a provision of the contract between Telus and its customers.

85) The principles articulated in *Campbell* also apply to the matter before the Commission:

\* “the contract governed the relationship between the parties” (ie Telus and its prepaid wireless customers); and

\* the Decision erred in ascribing a contractual term based on the Wireless Code (ie the extinguishment of the original contract for prior accumulated balances and the formation of a new contract with amended key terms for these prior accumulated balances upon the acquisition of a new top-up) without considering the actual terms of the contract between Telus and its prepaid wireless customers.

86) Furthermore, DiversityCanada/NPF submit that as outlined in *Water Street Pictures*, extrinsic evidence which the law permits to be considered in order to assist in the interpretation of a contract between parties consists of “evidence of their conduct in making their agreement and in fulfilling their obligations.” DiversityCanada/NPF respectfully submit that the Decision went outside of these boundaries when it used the Wireless Code as extrinsic evidence.

87) As the principles outlined in *Campbell* underscore, the Decision erred by interpreting the subject agreement according to the findings of the Wireless Code, and in using a section of the Wireless Code as the sole basis for framing the analysis of whether there was an existing contract which required Telus to obtain consent in order to make a material change.

88) In conclusion, DiversityCanada/NPF respectfully submit that i) the Decision's use of extrinsic material (the Wireless Code) that was not of a nature described as permissible by the court; and ii) the Decision's use of that extrinsic material not only as a first resort but to the exclusion of the contract itself was an error in law which requires that the Decision be overturned.

### 3.4 The Invalidity of the Approach Used

89) At paragraph 10 of its Answer, Telus stated:

In Decision 2015-211, the Commission was unequivocal that its determinations turned on the expiry of prepaid services and the new offer of prepaid services now being made under a prepaid monthly plan, with the key point was making sure that customers obtained notice of any change to the nature of the service based on the offer of prepaid services.

90) To underline its point that the Decision relied on the Commission's view of the formation, amendment and extinguishment of prepaid wireless agreements as articulated in the Wireless Code, Telus went on to quote from paragraph 10 of the Decision in which the Commission discussed Section D1 of the Wireless Code and the fact that this section does not apply to contracts for prepaid services.

91) DiversityCanada/NPF submit that Telus is correct in its assessment that the Decision's determination on this issue relied on Section D1 of the Wireless Code.

92) DiversityCanada/NPF further submit that this reliance on Section D1 renders the Decision reversible as this clause is invalid with respect to prepaid wireless consumers.

93) DiversityCanada/NPF made this submission in the Part I Application and further developed the point in a letter filed on 24 August 2015 in response to Telus' procedural request that the proceeding be closed. For ease of reference, the submission in that letter (slightly modified) is incorporated into this Reply below.

94) Section D1 of Telecom Regulatory Policy CRTC 2013-271 (the Wireless Code) stipulates that wireless services providers must not change key terms of a consumer agreement without obtaining consent; it refers to post-paid agreements and pointedly omits prepaid agreements.

95) The Commission's rationale for excluding prepaid wireless agreements from Section D1 was stated as follows at paragraph 87:

The Commission notes that for prepaid service contracts, the customer is accepting the key terms and conditions of the contract *each time they reactivate their service or top up their account*. As such, it is not necessary to prohibit changes to key terms and conditions of such contracts. The Commission expects WSPs that provide prepaid wireless services to clearly publicize any change to their services. [Emphasis added]

96) The Commission cited this rationale in the Decision that is the subject of this review and vary Application.

97) DiversityCanada/NPF respectfully submit that the passage demonstrates that the Commission's intention was to affirm two principles, which DiversityCanada/NPF agree are valid:

i) wireless services providers may change key terms of the standard form agreements for prepaid wireless services that they offer to consumers at any time;

- ii) each time consumers reactivate their service or top up their account, they accept the terms and conditions *in place at that time*.
- 98) DiversityCanada/NPF submit that the Commission's focus was on *new agreements* for prepaid wireless services when it considered this matter.
- 99) DiversityCanada/NPF submit that it is a fact that when a consumer is entering into a *new contract* for prepaid wireless services the customer is accepting the key terms as they exist at the time.
- 100) However, DiversityCanada/NPF submit that once a contract for prepaid wireless services has been made, a commitment period is created, and prepaid wireless consumers are entitled to certainty that no changes will be made to key terms of an *existing contract* without their express consent *during the commitment period*.
- 101) DiversityCanada/NPF note that prepaid wireless customers have commitment periods just as post-paid wireless customers do. Whereas post-paid consumers may have commitment periods for two years, prepaid wireless consumers have commitment periods that last for 30 days, 45 days, 60 days, and 356 days; and, DiversityCanada/NPF submit, in the case of balances that are carried over, the commitment period is indefinite as long as prepaid wireless consumers top up before the expiry date of the most recent top-up.
- 102) DiversityCanada/NPF respectfully submit, however, that in affirming the aforementioned two principles by way of omitting prepaid wireless services agreements from Section D1, the Wireless Code created an unintended consequence: it ostensibly removed certainty for prepaid wireless consumers that key contract terms and conditions will not change without their express consent *during the commitment period*.
- 103) DiversityCanada/NPF submit that for prepaid wireless consumers, their exclusion from Section D1 of the Wireless Code ostensibly has the opposite effect of the intentions the Commission had for wireless consumers when it introduced the Wireless Code.
- 104) At paragraph 86 of TRP CRTC 2013-271, the Commission articulated its rationale for including Section D1 in the Wireless Code. It stated:
- The Commission considers that consumers need certainty that key contract terms and conditions will not change without their express consent *during the commitment period*.  
[Emphasis added]
- 105) DiversityCanada/NPF submit that consumers who acquired top-ups prior to an amendment to a wireless services provider's standard form agreement cannot be subject to any changes during the commitment period, whether it be for 30 days, 60 days, 365 days, or indefinitely.
- 106) DiversityCanada/NPF submit that wireless services providers must obtain the consent of prepaid wireless services consumers in order to make material changes to their service agreements during the commitment period.

107) The court said in *Pogorzelec v. Dietz*:<sup>12</sup>

It is an established principle of contract law that where there is a binding contract and one party seeks to unilaterally change the terms of the contract, such actions constitute a breach of the contract.

108) DiversityCanada/NPF respectfully submit that the requirement for consent is a fundamental principle of contract law, and that the Commission erred in declaring that certain consumer contracts are subject to unilateral change without consent. Section D1 has the unintended consequence of breaching basic principles of contract law.

109) In conclusion, DiversityCanada/NPF submit that Section D1 of the Wireless Code is invalid with respect to prepaid wireless consumers and that since the Decision relies entirely on Section D1, the Decision should be overturned.

## 4.0 The Test for Duress

**ISSUE III) *Did the Commission fail to apply the proper test to determine whether there was duress?***

110) At paragraphs 15 to 20 of its Answer, Telus sought to make a distinction between two leading authorities on economic duress, *Byle v. Byle*<sup>13</sup> and *Pao On v. Lau Yiu Long*<sup>14</sup> which DiversityCanada/NPF had brought to the Commission's attention in the original Part I proceeding (8665-D53-201406877). Telus then sought to argue that *Byle* was not relevant and need not have been considered by the Commission during the 8665-D53-201406877 proceeding.

111) As will be shown presently, Telus' assertions are without substance and should be ignored.

112) At paragraph 20 of its Answer, Telus states:

Therefore, DiversityCanada's claim that the Commission committed an error of law in failing to follow the *Byle* case when conducting an assessment of economic duress fails. The Commission employed the proper legal test in *Pao On* and found no economic duress present on the facts.

113) DiversityCanada/NPF submit that Telus is mistaken in its view that when DiversityCanada/NPF directed the Commission's attention to *Byle* that it was not the "proper legal test in *Pao On*" that DiversityCanada/NPF had actually pointed to.

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12 [2000 BCSC 1834](#); para. 47  
13 1990 CanLII 313 (BC CA) ("*Byle*")  
14 [1980] A.C. 614 (Privy Council) ("*Pao On*")

- 114) The fact is that the legal test presented in *Byle* is “the proper legal test in *Pao On*” because in *Byle*, the court directly quoted a passage from *Pao On*.
- 115) By inference in the original Part I proceeding and directly in this present Part I review and vary Application, DiversityCanada/NPF drew the Commission's attention to the test for duress which is outlined in *Pao On* (and quoted in *Byle*). It is Lord Scarman of the Privy Council, who stated the following in *Pao On*:
- In determining whether there was a coercion of will such that there was no true consent, it is material to enquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are, as was recognised in *Maskell v Horner*, relevant in determining whether he acted voluntarily or not.
- 116) Thus, when DiversityCanada/NPF listed (at paragraph 111 of the Part I review and vary Application) elements of the proper test for duress which the Decision failed to apply, DiversityCanada/NPF were directing the Commission's attention to the test for economic duress articulated in the above passage from *Pao On*, which Telus acknowledges is “the leading authority on the issue of economic duress”<sup>15</sup> and as presenting “the proper test for duress.”
- 117) Additionally, in its Answer, Telus sought to draw a distinction on the basis that *Byle* dealt with duress involving threats of a physical nature. At paragraph 16 and 17 of its Answer, Telus states:
- TELUS adds that the *Byle* case is extravagantly distinguishable on its facts from the present circumstances. ... The decision in a case of credible death threats is of little use to illuminate the effects on the will of prepaid customers of a new option for service.
- 118) DiversityCanada/NPF submit, however, that, the court has stated there is no such distinction. In *Ellis v. Friedland*<sup>16</sup>, the court listed various forms of duress (physical threats; litigation threats; criminal prosecution threats; economic duress,) and stated that “All categories of duress have the same fundamental requirement – there must be 'coercion of the will so as to vitiate consent'”, which, in itself, echos *Pao On*.
- 119) Furthermore, on various occasions, the court has recognized the fact that there is no divergence between *Byle* and *Pao On*. In rulings on matters dealing with economic duress in which *Byle* was a precedent that was relied on, the court has stated that *Byle* adopts<sup>17</sup> the principles articulated in *Pao On*.
- 120) DiversityCanada/NPF submit that pointing the Commission to the proper test for duress in *Byle* is in fact pointing to the Commission to the test found in *Pao On*, the leading authority on economic duress. Thus, contrary to Telus' contention, DiversityCanada/NPF's submissions with respect to *Byle* were relevant and properly raised before the Commission.

15 Telus Answer; para. 16

16 2000 ABQB 657; para. 70

17 *Bell v. Levy*, 2011 BCCA 417, paras. 48 and 52; *Wang v. Sun*, 2014 BCSC 87, para. 45; *Boparai v. Bhullar*, 2008 BCSC 1382, para. 67

121) In conclusion, therefore, DiversityCanada/NPF submit that the Decision's failure to apply the proper test to determine whether there was duress was an error in law which requires that the Decision be overturned.

## 5.0 Procedural Fairness

**ISSUE IV)** *Did the Commission fail to provide reasons for its determination that Telus did not subject consumers to unjust discrimination and, did the Commission, therefore, breach its duty of procedural fairness?*

122) In its Answer, Telus mischaracterized DiversityCanada/NPF's argument with respect to the Commission's determination that there was no unjust discrimination.

123) Telus titled this section "Answer to Issue (4) – DiversityCanada's Position that the Commission Did Not Provide Sufficient Reasons for Its Determination Is Incorrect." Telus then proceeded to build an argument and cite judgements related to the provision of "sufficient reasons,"<sup>18</sup> the "adequacy of reasons,"<sup>19</sup> and the "quality of reasons."<sup>20</sup>

124) DiversityCanada/NPF submit that Telus' submission on this issue should be ignored as Telus focuses on an argument that was not raised in this Part I review and vary Application.

125) Contrary to Telus' claim, DiversityCanada/NPF did not argue that "the Commission failed to provide sufficient reason in Decision 2015-211."

126) Instead, DiversityCanada/NPF submitted that the Commission failed to provide ***any reason*** for its conclusion on the issue of unjust discrimination, even though there is a statutory requirement for the Commission to provide reasons.

127) Paragraphs 123, 132 and 136 of the Part 1 Application put this beyond a doubt:

**123.** DiversityCanada/NPF submit that the Commission failed to provide reasons in the Decision for its determination that Telus did not subject consumers to unjust discrimination. Failure to provide reasons is a breach of procedural fairness.

**131.** DiversityCanada/NPF respectfully submit (in the words of the Court, above) that in the Decision, the Commission "baldly state its conclusions" but does not touch on the points in issue, as it was required to do.

**135.** In conclusion, DiversityCanada/NPF respectfully submit that the failure to provide reasons is an error in law, and the Decision should be overturned.

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18 Telus Answer, para. 21  
19 *Ibid.*, para. 27  
20 *Ibid.*

128) The judgement cited by Telus, *Newfoundland Nurses*,<sup>21</sup> makes it clear that an argument that a decision-maker failed to provide *sufficient reasons* (as Telus wrongfully claimed DiversityCanada/NPF raised) is distinguishable from an argument that a decision-maker failed to provide *any reason* in a situation where reasons are required (as raised by this Part I review and vary Application):

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. But where, as here, there *are* reasons, there is no such breach. ... [Emphasis in the original]

129) Furthermore, as seen in the above citation, *Newfoundland Nurses* affirms that where reasons are required and no reasons are provided, there is a breach of procedural fairness requiring judicial review.

130) Subsequent to *Newfoundland Nurses*, parties have successfully argued before the courts that an absence of reasons where reasons are required is a breach of procedural fairness.<sup>22</sup>

131) DiversityCanada/NPF submit that the ruling in *Canada (Citizenship and Immigration) v. Hannoush* is particularly relevant to the present proceeding and is worth quoting at length:

[6] As a general proposition, it is not always necessary for a decision maker to provide reasons. A reviewing court is not to quash a decision if it is supportable on the evidence (*R v Sheppard*, 2002 SCC 26 (CanLII), [2002] 1 SCR 869). As the Supreme Court of Canada recently held in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (CanLII), [2011] 3 SCR 708, inadequacy of reasons is not a stand-alone basis for quashing a decision. The Court added at paragraph 22:

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. But where, as here, there are reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis.

[My emphasis.]

[7] In this case, reasons were required by statute. What the citizenship judge did was determine that Mr. Hannoush met the residency requirements. Her stated conclusion, in the “reasons” box in the Notice to the Minister, i.e. “I am satisfied that the applicant has met the requirements for residence as per 5(1)(c) of the Act.” is not a reason at all. It is the decision.

[8] When reasons are required, they must, in the context of the record, show why the judge decided as she did (*SRI Homes Inc v Her Majesty the Queen*, 2012 FCA 208 (CanLII)).

132) In the *Hannoush* case, the decision was quashed for the lack of reasons. DiversityCanada/NPF

21 *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62 (“*Newfoundland Nurses*”); para. 22

22 *Canada (Citizenship and Immigration) v. Hannoush*, 2012 FC 945; *SRI Homes Inc. v. Canada*, 2012 FCA 208; *Turberfield v. Canada*, 2012 FCA 170

submit that the Decision must be similarly overturned because the Decision similarly provides the Commission's decision or conclusion, rather than reasons.

133) In *Hannoush* the reviewing court identified the following statement as the decision or conclusion and pointed out that a conclusion is not a reason:

*I am satisfied that the applicant has met the requirements for residence as per 5(1)(c) of the Act.*

134) DiversityCanada/NPF submit that the following statement from the Decision is also the decision or conclusion and is not a reason:

*The applicants have not provided any evidence that customers affected by this policy are being treated any differently than any other group or entity in a comparable situation.*

135) Furthermore in *Komolafe v. Canada (Citizenship and Immigration)*<sup>23</sup> the court ruled where the decision-maker fails to provide reasons and the record offers no assistance in discerning what the reasoning process entailed, the decision must be overturned:

[9] The decision provides no insight into the agent's reasoning process. The agent merely stated her conclusion, without explanation. It is entirely unclear why the decision was reached.

[10] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011 SCC 62 \(CanLII\)](#), [2011] 3 SCR 708 does not save the decision.

*Newfoundland Nurses* ensures that the focus of judicial review remains on the outcome or decision itself, and not the process by which that outcome was reached. Where readily apparent, evidentiary *lacunae* may be filled in when supported by the evidence, and logical inferences, implicit to the result but not expressly drawn. A reviewing court looks to the record with a view to upholding the decision.

[11] *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.

136) DiversityCanada/NPF respectfully submit that similarly, there are no dots on the page to enable a reviewing court to understand why the Commission came to the conclusion it did. The record can provide a reviewing court no insight into the Commission's reasoning process.

- 137) Firstly, the original Part I procedure involved written submissions and at no point prior to the release of the Decision did the Commission make any input that could give any indication as to the Commission's views on the evidence and arguments presented.
- 138) Secondly, the Decision fails to make any mention of the second of the two bases on which DiversityCanada/NPF asserted that there was unjust discrimination, namely that the prepaid credits are the subject property in a legal dispute and the Large Balance Policy would foreclose on consumers' ability to benefit from a possible favourable outcome and would enable Telus to reduce its liability under an outcome that was favourable to consumers. DiversityCanada/NPF submit that a reviewing court is therefore not able to know whether the Commission was alive to this issue in the first place, or if it was, how it applied the facts of this case to the standard test for unjust discrimination.
- 139) DiversityCanada/NPF respectfully submit that, similarly, the record cannot assist a reviewing court in understanding why the Commission did not accept DiversityCanada/NPF's argument that Telus gives itself the undue preference of profiting by forcing consumers to draw down their balance in a manner their original contract did not require them to, and subjected consumers to the undue disadvantage of having expend sums on services they never indicated they wanted and were unlikely to use, and which their original contract did not require them to expend. While the Decision does briefly summarize this argument, the Decision does not show a reviewing court how the Commission applied the facts to the standard test of unjust discrimination.
- 140) DiversityCanada/NPF note that in *SRI Homes Inc. v. Canada*,<sup>24</sup> the court stated that it is an error in law for a decision-maker to fail to provide reasons particularly where the record cannot assist in allowing a reviewing court to know why the decision-maker chose one argument above another when parties provide competing arguments:

[19] In the present case, for the reasons which follow, I have concluded that on the state of the record before the Tax Court, the Judge erred in law by failing to give adequate reasons for his decision.

[20] First, as noted above, the parties provided competing theories to the Tax Court. For the taxpayer, the issue was whether the portion of the proceeds of disposition that were allocated to the two shareholder loans represented their fair market value, and if so, whether the resulting loss was on account of income. However, the Judge gave no explanation as to why he chose to frame the issues as defined by the Crown in its pleading. I am unable to discern from the record why the Judge was not obliged to deal with the case as framed by the appellant and supported by the evidence adduced by the appellant.

- 141) DiversityCanada/NPF submit that that the record shows the parties offered competing arguments on the issue of unjust discrimination to the Commission. The Decision accepted the view put forward by Telus and the Commission was required to explain why it did not accept the alternative view put forward by DiversityCanada/NPF.

142) In conclusion, DiversityCanada/NPF submit that the absence of reasons in the Decision is an error in law and the Decision cannot stand.

## 6.0 The Policy Objectives

**ISSUE V)** *Is the Decision contrary to the policy objectives of the Telecommunications Act?*

143) DiversityCanada/NPF submit that Telus' arguments<sup>25</sup> that there was no basis for DiversityCanada/NPF's position that the Decision was contrary to s. 7 of the Act are without merit and should be ignored.

144) Telus based its argument on the notion that there was no validity to DiversityCanada/NPF's submission that Telus operated under invalid agreements, Telus subjected consumers to duress, and Telus made material changes to consumer contacts without consent.

145) DiversityCanada/NPF submit that this Reply rebuts Telus' arguments on all three points and demonstrates that Telus did indeed operate under invalid agreements; subject consumers to duress; and make material changes to consumer contacts without consent.

146) In paragraphs 35 to 37 of its Answer, Telus also referred to statements made by the Commission and the Governor in Council in response to review and vary applications by DiversityCanada/NPF. Telus noted that these entities stated that the Wireless Code's findings about balance expiry for prepaid wireless services were consistent with the policy objectives of the Act.

147) DiversityCanada/NPF note that the review and vary applications in question focused on prepaid wireless balances subject to seizure. That is to say, the statements Telus refers to arose out of proceedings that considered the scenario in which consumers do not top up before the expiry date and their balances are seized and are said to have expired.

148) Balances subject to seizure play no part in the present proceeding.

149) The present proceeding is concerned solely with prepaid credits which are not seized, and which, consequently, do not expire on an expiry date, but, instead, are "carried over".

150) Thus Telus' reference to statements by the Commission and the Governor in Council concerning balances subject to seizure are irrelevant and should be ignored.

151) In conclusion, DiversityCanada/NPF respectfully submit that Telus provided no credible argument that should cause the Commission to find other than that the Decision permitted Telus to operate under invalid agreements; subject consumers to duress; and make material changes to

consumer contacts without consent, contrary to the policy objectives as set out in the this review and vary application. Thus, the Decision should not stand.

## 7.0 Conclusion

- 152) For all the above reasons, DiversityCanada/NPF respectfully submit that Telus' objections to this review and vary application should be ignored and the application should be allowed.
- 153) DiversityCanada/NPF submit that an examination of the contract for prepaid wireless services is sufficient to persuade the Commission that the agreement provided that when consumers met the obligation to top up before the expiry date, their prior accumulated prepaid credits would be carried over, and thus would not expire, and neither would the contracts under which those credits were acquired. Therefore, DiversityCanada/NPF submit that the Commission should find that Telus was required to obtain valid consent to amend the existing contract in order to introduce its Large Balance Policy and failed to do so.
- 154) Furthermore, DiversityCanada/NPF respectfully submit that the Commission should find that Telus' arguments – *i) that the contracts for prepaid wireless services associated with credits that are “carried over” expire on top-up expiry dates; and ii) that each time consumers top up they are agreeing that the newest terms apply to their contracts for prior accumulated credits –* lack credibility.
- 155) DiversityCanada/NPF submit that Telus failed to support its arguments with any evidence of an offer, acceptance or consideration to create an agreement to terminate the contracts that were formed when the prior accumulate credits were originally acquired. DiversityCanada/NPF submit that Telus also failed to demonstrate that credits which were carried over formed consideration for the new contract that came into effect on 20 October 2013 (which would have had to have occurred if these credits were to be subject to the new terms related to the Large Balance Policy).
- 156) Alternatively, DiversityCanada/NPF submit that should the Commission be persuaded by Telus' arguments, at best, the agreement must be deemed ambiguous, given the evidence and arguments presented by DiversityCanada/NPF that when credits are carried over neither the credits nor the contracts under which they were acquired expire.
- 157) In such a scenario, DiversityCanada/NPF submit that paragraph 387 of Telecom Regulatory Policy CRTC 2013-271 (the language of which was incorporated into the Wireless Code) provides clear and unequivocal direction as to how the matter should be decided:

378. The Commission notes that as with any new set of rules, there may be issues of interpretation that it has not anticipated. In order to ensure the greatest benefit to consumers, if any part of the Code or a consumer's contract is ambiguous, or if it is unclear how the terms of the Code or the contract are to be applied, then the Code and the contract must be interpreted in a manner that is favourable to the consumer.

158) DiversityCanada/NPF therefore respectfully submit that the Decision should be overturned and the relief requested in the original Part I Application (8665-D53-201406877) should be provided.

159) All of which is respectfully submitted this 13<sup>th</sup> day of October, 2015.

\*\*\*\*End of Document\*\*\*\*