



Telecom Decision CRTC 2016-184

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The DiversityCanada Foundation and the National Pensioners Federation – Application to review and vary Telecom Decision 2015-211 regarding TELUS Communications Company’s Large Prepaid Balance Policy

*The Commission **denies** an application from the DiversityCanada Foundation and the National Pensioners Federation to review and vary Telecom Decision 2015-211.*

Background

1. In Telecom Decision 2015-211, the Commission considered a request from the DiversityCanada Foundation (DiversityCanada) and the National Pensioners Federation (NPF) [collectively, DiversityCanada/NPF] for relief in respect of TELUS Communications Company’s (TCC) Large Prepaid Balance Policy (TCC’s policy).
2. TCC’s policy came into effect on 20 October 2013, and requires the company’s wireless customers who have accumulated a prepaid account balance of over \$300 to subscribe to a monthly prepaid rate plan or a monthly add-on plan. If such a customer does not subscribe to either plan, TCC automatically adds the least expensive voice and messaging plan to the customer’s prepaid account; the cost of this plan is then deducted from the account balance every 30 days.
3. In the application that led to Telecom Decision 2015-211, DiversityCanada/NPF submitted that (i) TCC made a material change to customer contracts without consent when applying its policy; (ii) TCC subjected customers to duress when applying its policy, making the resulting contract changes invalid; and (iii) TCC’s policy contravenes subsections 27(1) and 27(2) of the *Telecommunications Act* (the Act).¹
4. In Telecom Decision 2015-211, the Commission rejected DiversityCanada/NPF’s arguments and denied their request for relief.

¹ Subsection 27(1) of the Act states that every rate charged by a Canadian carrier for a telecommunications service shall be just and reasonable. Subsection 27(2) states that no Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable disadvantage.

Application

5. The Commission received an application from DiversityCanada/NPF, dated 17 August 2015, in which they requested that the Commission review and vary Telecom Decision 2015-211.
6. DiversityCanada/NPF submitted that the Commission had erred in law and in fact by
 - finding that TCC's 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 a monthly plan;
 - failing to apply the proper test to determine whether there was an existing contract, which required TCC to obtain consent to make a material change;
 - failing to apply the proper test for duress;
 - failing to provide reasons for its determination that TCC did not subject consumers to unjust discrimination, thereby breaching its duty of procedural fairness; and
 - issuing a decision that was contrary to the policy objectives of the Act.
7. The Commission received interventions regarding DiversityCanada/NPF's application from TCC, Vaxination Informatique (Vaxination), and various individuals. The public record of this proceeding, which closed on 13 October 2015, is available on the Commission's website at <http://www.crtc.gc.ca> or by using the file number provided above.

Review and vary criteria

8. In Telecom Information Bulletin 2011-214, the Commission outlined the criteria it uses to assess review and vary applications that are filed pursuant to section 62 of the Act. Specifically, the Commission stated that applicants must demonstrate that there is substantial doubt as to the correctness of the original decision, for example due to
 - an error in law or in fact;
 - a fundamental change in circumstances or facts since the decision;
 - failure to consider a basic principle which had been raised in the original proceeding; or
 - a new principle which has arisen as a result of the decision.

Issues

9. The Commission has identified the following issues to be addressed in this decision:

- Did the Commission err in finding that TCC was entitled to change contractual terms by means of its policy?
- Did the Commission fail to apply the proper test to determine whether there was duress?
- Did the Commission fail to provide reasons for its determination that TCC did not subject consumers to unjust discrimination and, therefore, breach its duty of procedural fairness?
- Are the determinations in Telecom Decision 2015-211 contrary to the policy objectives of the Act?

Did the Commission err in finding that TCC was entitled to change contractual terms by means of its policy?

10. DiversityCanada/NPF submitted that while TCC's terms of service contain a clause that permits TCC to change the price for wireless services, it was factually incorrect and unsupported by any evidence for the Commission to find that this same clause entitled the company to change the nature of the payment arrangement under which consumers contracted to receive wireless services (i.e. from one that was on a pay-per-use basis to one requiring the acquisition of a monthly plan).
11. DiversityCanada/NPF also submitted that the Commission erred in law by not applying the proper test to determine whether there was an existing contract. In DiversityCanada/NPF's view, application of the proper test would have required TCC to obtain consent to make a material change to the contract.
12. DiversityCanada/NPF argued that the correct means of establishing whether a contract exists is by using basic common law contractual principles. They submitted that a contract for pay-per-use wireless services could only be extinguished when a consumer had exhausted all the accumulated balances and TCC had provided the corresponding services. As a result, if balances remained, TCC was required to obtain valid consent in order to change the existing contract.
13. TCC submitted that DiversityCanada/NPF failed to appreciate the fact that the Commission has previously found that prepaid services (including prepaid cards) are subject to expiry, such 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 plan.

Commission's analysis and determinations

14. DiversityCanada/NPF made similar arguments in the proceeding leading to Telecom Decision 2015-211. As set out in Telecom Regulatory Policy 2013-271 (the Wireless Code policy), and reiterated in Telecom Decision 2015-211, when customers renew their prepaid accounts via top-up, they are accepting (or consenting to) the key terms and conditions of a new contract, as offered by a wireless service provider. The focus of the Wireless Code policy with respect to prepaid customers is therefore on ensuring that customers obtain notice of contractual changes in order to make informed decisions upon topping up.
15. In Telecom Decision 2015-211, the Commission acknowledged that TCC provided affected customers with 60 days' notice prior to the introduction of its policy, which predated and exceeded the requirement prescribed in the Wireless Code. Moreover, TCC's policy was applied to customers upon their first top-up after they had exceeded the \$300 threshold. The top-up triggered the establishment of a new contract; thus the customers, by topping up, agreed to the new terms and conditions. In the Commission's view, this is consistent with the three basic elements of contract formation (offer, acceptance, and consideration), which DiversityCanada/NPF alleged the Commission had failed to take into account.
16. The Commission remains of the view that prepaid contracts expire, regardless of unused credit balances, and that customers are impacted by any new contractual terms upon topping up, at which point a new contract is formed. Accordingly, TCC's introduction of its policy did not constitute a contract amendment (including a change to a payment arrangement) to an existing prepaid service contract, but the offer of new contractual terms to which a customer could consent and accept or not.
17. DiversityCanada/NPF have not provided any new rationale that raises substantial doubt as to the correctness of the Commission's determination that unused credits do not keep a prepaid contract "alive" or that a new contract is formed upon topping up. They have also not demonstrated that the Commission erred in law regarding whether there was an existing contract or whether TCC had breached the principle of obtaining customer consent to make a material change.

Did the Commission fail to apply the proper test to determine whether there was duress?

18. DiversityCanada/NPF submitted that the Commission committed an error in law by failing to apply the proper test to determine whether TCC subjected its customers to duress. They cited jurisprudence that, in their view, set out the proper approach that the Commission was required to follow. They further argued that the alternatives identified by the Commission in Telecom Decision 2015-211 (e.g. having customers draw down their accounts below \$300) did not constitute adequate legal remedies for customers.

19. Vaxination submitted that the Commission failed to consider whether the customer can refuse the changes imposed by TCC, and that TCC's prepaid customers should be able to end their service, with the company refunding unused balances to customers.
20. TCC argued that it is clear from Telecom Decision 2015-211 that the Commission employed the proper test. For instance, the Commission found that the introduction of TCC's policy did not place affected customers under economic pressure, and identified the various alternatives open to affected customers. The company indicated that the availability of these reasonable and valuable options defeats DiversityCanada/NPF's contention that TCC subjected its customers to duress.

Commission's analysis and determinations

21. Both DiversityCanada/NPF and TCC cited jurisprudence relating to claims of economic duress.² As set out in this jurisprudence, the test for this form of duress is determined to be satisfied when economic pressure exerted by one party amounts to "coercion of the will," such that the other party's options are foreclosed, and so as to vitiate its consent.
22. DiversityCanada/NPF have failed to demonstrate that the Commission relied on the wrong test, or wrongly applied the test, to examine economic duress. In Telecom Decision 2015-211, the Commission carefully considered the factual circumstances accompanying TCC's implementation of its policy. In the Commission's view, of particular relevance was the existence of advance notice provided by TCC about the policy change and of alternatives available to affected consumers. The existence of practical alternatives is, in the Commission's view, directly relevant to an analysis of duress.
23. Further, the arguments regarding the unavailability of adequate alternatives should also be dismissed. While DiversityCanada/NPF identified potential disadvantages of the options that could be perceived by certain consumers, they did not establish that there were no practical alternatives available.
24. In conclusion, DiversityCanada/NPF have not demonstrated that the Commission erred in law by relying on the wrong test for duress, and have therefore failed to demonstrate substantial doubt as to the Commission's decision on the basis alleged.

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

25. DiversityCanada/NPF argued that the Commission failed to provide any reason for its conclusion on the issue of unjust discrimination, and stated its conclusions without considering DiversityCanada/NPF's arguments on the points at issue.

² For instance, *Pao On v Lau Yiu Long*, [1980] AC 614 (UKPC).

DiversityCanada/NPF submitted that this is an error in law on which to overturn the decision.

26. TCC submitted that the Commission used the appropriate two-part test to assess an allegation of unjust discrimination or undue preference under subsection 27(2) of the Act, adding that the Commission did not have to make a finding on each assertion raised by DiversityCanada/NPF. It submitted that the Commission did not breach its duty of procedural fairness, and that a reviewing court would be able to understand, based on the reasons contained in the decision, why the Commission made its determination.

Commission's analysis and determinations

27. The Commission clearly set out the reasons supporting its determination on this topic in paragraphs 27 and 28 of Telecom Decision 2015-211.
28. The decision clearly explained the two-part test to be applied when assessing a claim of undue preference or unjust discrimination, specifically, that the burden is on the applicant (i.e. DiversityCanada/NPF) to demonstrate that the conduct in question is discriminatory or preferential, which would involve identifying two comparable entities that are being treated differently by a Canadian carrier. The decision made clear that DiversityCanada/NPF did not meet this burden.
29. Further, there is no legal principle that obliges the Commission to set out each of DiversityCanada/NPF's arguments and address them individually.
30. In light of the above, the Commission did provide reasons for its determination, as set out at the above-noted paragraphs, and these reasons demonstrate that the Commission considered DiversityCanada/NPF's position. For instance, the Commission's statement that DiversityCanada/NPF did not provide sufficient evidence to meet the first part of the subsection 27(2) test implies that the Commission considered the arguments put forward by the applicants. Further, the reasons are sufficiently fulsome and intelligible to enable DiversityCanada/NPF, other interested persons, and a reviewing court to understand the decision and the Commission's rationale for making its determinations.
31. Therefore, the Commission did not err in law by failing to provide reasons, as alleged by DiversityCanada/NPF.

Are the determinations in Telecom Decision 2015-211 contrary to the policy objectives of the Act?

32. DiversityCanada/NPF submitted that Telecom Decision 2015-211 should be overturned because it allows TCC to make material changes to contracts without

customers' consent and to subject customers to duress, contrary to the policy objectives set out in paragraphs 7(a), (f), and (h) of the Act.³

33. TCC stated that DiversityCanada/NPF's position on this issue should be rejected, submitting that Telecom Decision 2015-211 could only be contrary to the policy objectives of the Act if the Commission had found in DiversityCanada/NPF's favour regarding material changes to agreements and duress; however, it did not do so.

Commission's analysis and determinations

34. DiversityCanada/NPF's argument that the Commission's decision conflicts with the policy objectives of the Act is based on the alleged existence of duress and material changes to existing customer contracts. However, in Telecom Decision 2015-211, the Commission found that TCC did not subject its customers to duress, or make a material change to a contract without consent. For these reasons, and the other reasons set out in that decision, the Commission determined that its intervention was not necessary.
35. These considerations, as well as the ultimate result, are consistent with the policy objectives of the Act, particularly with respect to those set out at paragraphs 7(a), (b),⁴ (f), and (h).
36. DiversityCanada/NPF have not provided convincing arguments that the Commission's decision was contrary to the policy objectives of the Act.
37. In light of the above, the Commission's determinations in Telecom Decision 2015-211 are consistent with the policy objectives of the Act.

Conclusion

38. DiversityCanada/NPF have not demonstrated that the Commission made errors in fact or in law that raise substantial doubt as to the correctness of its determinations on TCC's policy. The Commission therefore **denies** DiversityCanada/NPF's application to review and vary Telecom Decision 2015-211.
39. Since the issuance of the Wireless Code policy, the Commission has dealt with numerous applications from DiversityCanada/NPF regarding prepaid wireless balances. DiversityCanada/NPF have continually attempted to question the appropriateness of the Commission's policies regarding such balances, while misunderstanding the relevant regulatory framework. In Telecom Orders 2015-132 and 2015-240, the Commission cautioned DiversityCanada that continuing to seek a

³ The cited objectives are 7(a) to facilitate the orderly development of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions; (f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective; and (h) to respond to the economic and social requirements of users.

⁴ The cited policy objective is to render reliable and affordable telecommunications services of high quality to Canadians in both urban and rural areas in all regions of Canada.

different result from the Commission on this issue constituted an unreasonable use of Commission resources, and that the ongoing flow of applications undermined the applicant's credibility.

40. In Telecom Decision 2016-183, also released today, the Commission announced a procedural measure to curtail the unreasonable use of resources caused by the multiplicity of proceedings on this well-settled subject, whereby the Commission intends to summarily return any new application from DiversityCanada (filed either solely on its own behalf or otherwise) relating to the appropriateness of the Commission's prepaid wireless balance policies, without consideration of the merits of the application.

Secretary General

Related documents

- *The DiversityCanada Foundation and the National Pensioners Federation – Application to review and vary Telecom Order 2015-240 with respect to costs for their participation in the proceeding leading to Telecom Decision 2015-211, Telecom Decision CRTC 2016-183, 13 May 2016*
- *Determination of costs award with respect to the participation of the DiversityCanada Foundation in the proceeding regarding TELUS Communications Company's Large Prepaid Balance Policy, Telecom Order CRTC 2015-240, 4 June 2015*
- *The DiversityCanada Foundation and the National Pensioners Federation – Application seeking relief for wireless customers affected by TELUS Communications Company's Large Prepaid Balance Policy, Telecom Decision CRTC 2015-211, 21 May 2015*
- *Determination of costs award with respect to the participation of the DiversityCanada Foundation in the proceeding leading to Telecom Decision 2015-131, Telecom Order CRTC 2015-132, 9 April 2015*
- *The Wireless Code, Telecom Regulatory Policy CRTC 2013-271, 3 June 2013*
- *Revised guidelines for review and vary applications, Telecom Information Bulletin CRTC 2011-214, 25 March 2011*