PETITION TO HIS EXCELLENCY
THE GOVERNOR IN COUNCIL

PURSUANT TO SECTION 12(1) OF
THE
TELECOMMUNICATIONS ACT

IN THE MATTER OF

TELECOM DECISION CRTC 2015-131
(DiversityCanada Foundation Application
to review and vary Telecom Order 2014-220)

AND

TELECOM ORDER CRTC 2015-132
(Determination of costs award with respect to
the participation of the DiversityCanada Foundation
in the proceeding leading to Telecom Decision 2015-131)
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I. OVERVIEW

1. The Petitioners represent the consumer interest: the DiversityCanada Foundation (“DiversityCanada”), is a federally-registered not-for-profit organization which works to protect the rights and promote the interests of the disadvantaged, the vulnerable, and the marginalized; and the National Pensioners Federation (“NPF”), is a non-partisan organization composed of 350 seniors’ chapters and clubs across Canada with a collective membership of 1,000,000 Canadian seniors and retired workers, whose mission is to stimulate public interest in the welfare of aging Canadians. Many disadvantaged, vulnerable and marginalized consumers use prepaid wireless services (because it is ostensibly the least expensive option for wireless services).

2. Following the June 2013 release of the Wireless Code by the Canadian Radio-television and Telecommunications Commission (CRTC), the Petitioners requested that the CRTC review and vary its decision not to ban expiry dates on the funds which prepaid wireless consumers deposit into accounts in order to purchase wireless services. The Petitioners also applied for costs for their participation in the review and vary proceeding. The CRTC denied the Petitioners' request for costs, which prompted the Petitioners to request the CRTC review and vary this denial.

3. In Telecom Decision CRTC 2015-131, the CRTC denied the Petitioners' request that it review and vary its decision to deny the Petitioners' costs application. And in Telecom Order CRTC 2015-132, the CRTC denied the Petitioners costs application for their participation in the proceeding that led to Telecom Decision CRTC 2015-131.

4. This Petition requests that the Governor in Council vary Telecom Decision CRTC 2015-131 and Telecom Order CRTC 2015-132 so as to allow the Petitioners' costs, with interest.

5. The Petitioners submit that the Governor in Council (“GIC”) has the authority to review this Petition. The GIC may act in an administrative or quasi-judicial role. Furthermore, the Governor in Council must not only uphold the rule of law, but must be seen to do same. The Petition is brought on valid and appropriate grounds, based on established practices whereby decisions of the CRTC may be reviewed for errors of law and errors of fact.

6. The Petitioners further submit that consideration of the Petition is necessary to protect the public interest since the decisions in question imperil the integrity of the CRTC's costs award procedures. The CRTC's costs award procedures are essential to ensuring that Canadians have access to the CRTC's procedures to protect their rights as telecommunications consumers and to ensuring that the CRTC fulfills its mandate. The decisions in question run the risk of leading to unjust outcomes and having a chilling effect on public participation in the CRTC's procedures.

7. The decisions in question should be reviewed to ascertain whether they are reasonable, as this is the standard of review stipulated by the Supreme Court of Canada (“SCC”) where questions of law, and of mixed law and fact are raised on decisions which engage the mandate of an administrative tribunal.

8. The Petitioners submit that the CRTC erred in misinterpreting the SCC's determination as to whether the CRTC's costs award procedures should be governed by the same principles as those of a Court. The CRTC wrongly interpreted that the CRTC was empowered to act like a Court, and, specifically, that its costs award procedures were unlike those of other administrative
tribunals whose costs award procedures were directed towards encouraging public participation in their proceedings. This misinterpretation led the CRTC to dismiss relevant principles outlined in a decision of the Alberta Court of Appeal — *Kelly v Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19 (“Kelly”) — and to the unreasonable outcome that the Petitioners' costs were denied.

9. The Petitioners submit that the CRTC erred in not giving sufficient weight to the principles relevant to costs award procedures before administrative tribunals as set out in the *Kelly* decision of the Alberta Court of Appeal. In doing so, the CRTC ignored the Court's reasoning that since an administrative tribunal is geared towards ascertaining the public interest (in which scenario there are no winners and losers as in litigation before a court), it would be unreasonable to deny costs on a measure of perceived success of an applicant's intervention.

10. The Petitioners submit that the CRTC erred in determining that the Petitioners did not meet the eligibility criterion of contributing to a better understanding by the Commission of the issues under consideration on the basis that the CRTC did not accept the Petitioners' arguments in the substantive matter. This was contrary to the intentions of the CRTC's costs award procedures, as in its guidelines, the CRTC indicated that this criterion was to be directed to ascertaining the manner in which applicants participated in the substantive matter, rather than to ascertaining the merits of the applicant's submissions in the substantive matter.

11. The Petitioners submit that it is unreasonable for the CRTC to deny costs solely or primarily on its determination of the merits of the arguments in the substantive matter as this alters the nature of the costs award procedure, and sets the stage for unjust outcomes.

12. The Petitioners submit that the CRTC made an error in finding that the Petitioners added “no new substantive elements to the Commission's deliberations in its factual submissions”. The Petitioners presented the CRTC with arguments and analysis based on numerous leading authorities which had not been presented to the CRTC by any participant prior to their introduction by the Petitioners and which were pertinent to the matters under consideration.

13. The Petitioners submit that the CRTC made an error in finding in Telecom Order CRTC 2015-132 that the Petitioners were ineligible for an award of costs for the above-mentioned reasons.

14. The Petitioners submit that the CRTC made an error in Telecom Order CRTC 2015-132 in finding that the Petitioners did not offer a distinct point of view as the Petitioners were the sole participant to present the point of view of consumers in the relevant proceeding.

15. The Petitioners submit that the CRTC's determination that the outside consultant's fees should be reduced was based on invalid grounds. The consultant is a highly qualified and experienced researcher whose status as such had been recognized by the CRTC in several prior costs award decisions; furthermore, the consultant worked under the supervision of a lawyer with 26 years of experience. Resumes and professional certification were required for subject areas that were not considered in the proceeding for which the Petitioners applied for costs and it was unreasonable of the CRTC to state the consultant's fees should be reduced because such resumes and certification were not provided. The requirement that costs applicants provide justification for the use of an outside consultant was introduced *after* the Petitioners filed their costs application and was unreasonably applied to the costs award decision in question.
16. For all the above reasons, the Petitioners request that the Governor in Council vary Telecom Decision CRTC 2015-131 and Telecom Order CRTC 2015-132 so as to allow the Petitioners' costs, with interest.

II. BACKGROUND AND SUMMARY OF FACTS

The Petitioners

17. Established in 2004, the DiversityCanada Foundation (“DiversityCanada”) is a federally-registered not-for-profit organization based in Elliot Lake, Ontario. DiversityCanada works to protect the rights and promote the interests of the disadvantaged, the vulnerable, and the marginalized. Many disadvantaged, vulnerable and marginalized consumers use prepaid wireless services (because it is ostensibly the least expensive option for wireless services).

18. In May 2012, DiversityCanada's Executive Director, Ms. Celia Sankar, acting in her private capacity as an individual consumer, launched a class action lawsuit on behalf of Bell Mobility prepaid wireless customers in Ontario. DiversityCanada established an online education and mobilization campaign at the website http://BellGiveOurMoneyBack.com in June 2012. The campaign called for an end to practices by Bell with respect to prepaid wireless balance expiry which DiversityCanada described as harmful to vulnerable consumers. Consumers nationwide responded to that campaign and called for an end to the practice of prepaid wireless balance expiry across the entire wireless sector. Consequently, when the CRTC called for comments as it sought to regulate the wireless sector, DiversityCanada took this consumer demand to the CRTC's Wireless Code Proceeding.

19. Established in 1945 and incorporated in 1954, the National Pensioners Federation (the “NPF”, formerly the National Pensioners and Senior Citizens Federation) is a democratic, non-partisan, non-sectarian organization composed of 350 seniors’ chapters and clubs across Canada. It has a collective membership of 1,000,000 Canadian seniors and retired workers and its mission is to stimulate public interest in the welfare of aging Canadians. The goal of the NPF is to help seniors and retirees have a life of dignity, independence and financial security. Many seniors use prepaid wireless services (because it is ostensibly the least expensive option for wireless services), and, therefore, have an interest in this matter. Consequently, the NPF partnered with DiversityCanada to request that the CRTC protect consumers by prohibiting the practice whereby telecommunications companies seize funds, estimated at between $138 million and $372 million per year, when they claim that prepaid wireless customers' balances expire.

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1 Unused funds seized by providers of prepayment products are referred to as “breakage”. Breakage on prepaid phone cards (which are similar to prepaid wireless services) was conservatively estimated in a 2010 lawsuit brought by the District of Columbia against AT&T at 20 percent. The conservative estimate of $138 million is arrived at by calculating 20 percent of the average revenue per prepaid subscriber (referred to as average revenue per unit or per user, and abbreviated as “ARPU”) and multiplying by 3.6 million prepaid subscribers. The ARPU is based on the figure ($15.64) provided by Rogers for 2013. (Bell does not currently provide segregated ARPU for its prepaid sector; however, up to 2010 when it did provide such data, its prepaid ARPU was as much as 10 per cent higher than that of Rogers. Telus has not provided segregated ARPU data for its prepaid wireless sector over the years.) An earlier estimate of breakage, referenced on page 10 in the discussion paper (“Prepaid Card Markets & Regulation”) issued by the Federal Reserve Bank of Philadelphia, put such breakage at 50 percent. A less conservative estimate of prepaid wireless breakage, therefore, puts consumer losses at $372 million per year.
The CRTC

20. Created by the Parliament of Canada, the CRTC is an administrative tribunal that regulates and supervises broadcasting and telecommunications in the public interest.

21. The CRTC regularly holds public hearings, round-table discussions, informal forums, and online discussion forums designed to gather Canadians' views about broadcasting and telecommunications service and uses this information to then act on to serve the public interest.

22. Its authority concerning telecommunications matters is governed by the *Telecommunications Act* (the “Act”).

The CRTC's Part I Procedures


24. Under the Rules of Procedure, public interest groups that have a grievance may initiate a procedure before the CRTC on any number of telecom-related subjects by filing a Part I application to have the matter heard.

25. When public interest groups file a Part I application, the CRTC has the authority to not allow a proceeding to go forward if it determines that the application does not disclose a *prima facie* case. As recently as July 28, 2014, the CRTC exercised this power when it closed the file on a Part I application by the Public Interest Advocacy Centre to review and vary Telecom Decision CRTC 2014-349.

26. In allowing a Part I proceeding to go forward, the CRTC explores the possibility that the issues raised in the *prima facie* case are valid.

The CRTC's Costs Award Procedures

27. Section 56 of the Act authorizes the CRTC to award costs associated with telecommunications proceedings, as well as to determine by whom and to whom costs are to be paid, and in what amounts.

28. The CRTC’s costs award procedures are set out in sections 44-45 of the *CRTC Telecommunications Rules of Procedure* (the Telecommunications Rules) and sections 60-71 of the Rules of Procedure, the Guidelines for the Assessment of Costs (the “Guidelines”), and precedents established by previous CRTC costs awards determinations.

29. Section 68 of the Rules of Procedure sets out the criteria for awarding costs as follows:
The Commission must determine whether to award final costs and the maximum percentage of costs that is to be awarded on the basis of the following criteria:

a. whether the applicant had, or was the representative of a group or a class of subscribers that had, an interest in the outcome of the proceeding;

b. the extent to which the applicant assisted the Commission in developing a better understanding of the matters that were considered; and

c. whether the applicant participated in the proceeding in a responsible way.

30. In Telecom Decision CRTC 78-4 of May 23, 1978, the CRTC stated that one of the objectives of its practices and procedures was to "increase the capacity of interveners to participate at public hearings in an informed way".2

31. In Telecom Decision 81-5, the CRTC stated: "In the Commission's opinion, the proper purpose of such [costs] awards is the encouragement of informed public participation in Commission proceedings."3

Prepaid, Pay-Per-Use Wireless Services

32. Wireless services are provided by wireless services providers ("WSPs"), such as Bell, Rogers and Telus, and enable users to communicate with others via mobile devices such as cellphones, smartphones and tablets. Services include voice calls; text messaging; video messaging; web browsing; downloading or using games and apps; downloading music, ringtones, wallpapers, illustrations, etc.

33. The majority of wireless consumers (upwards of 80%) sign multi-year contracts with their WSPs. Under these contracts, these so-called post-paid customers use services and, every month, receive bills that list charges for the volume of services used during the previous month.

34. Prepaid wireless services offer an alternative to this arrangement. Instead of signing a long-term contract and paying after-the-fact, customers pay certain sums in advance in order to use wireless services. These customers can end their usage of the services at will.

35. Prepaid wireless services are advertised as costing as little as $10 per month. Prepaid wireless services can be acquired with cash. This makes prepaid wireless services the only option available for persons who do not qualify for a credit card or who have no bank account.

36. For this reason, consumers of prepaid wireless services skew heavily towards the vulnerable and disadvantaged, including pensioners, minimum-wage workers, youth, the unemployed, individuals on income support, and newcomers to Canada.

37. Prepaid wireless services are offered under two distinct business models: one is a monthly plan and the other is a pay-per-use arrangement.

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2 Bell Canada v. Consumers' Assoc. of Canada, [1986] 1 SCR190, 1986 CanLII 49 (SCC); para. 8
3 Ibid: para. 19
38. Under a prepaid monthly plan, WSPs provide specific usage limitations, for a specific period of time, for a pre-determined price. For instance, a WSP would offer consumers 30 days in which to make 50 local calls and send 50 local texts, for which consumers would pay a specified fee in advance, eg $10.

39. By contrast, under a pay-per-use arrangement the WSP does not stipulate any usage limitations. Instead, the WSPs advertise that consumers may deposit funds into a prepaid wireless account and must use those funds within 30 days to purchase wireless services (eg voice calls, texts, video messages) or electronic goods (eg ringtones, games, apps) in any volume or combination as the funds allow, and according to the consumer's discretion.

40. The issues raised by the Petitioners before the CRTC concerned only prepaid wireless services offered on a pay-per-use basis.

41. Under the pay-per-use business model, customers give the WSP a certain sum in advance to acquire what is referred to as a “top-up”. A top-up is an amount that is recorded as a cash balance in customers' accounts.

42. Acquiring a top-up is not a purchase of wireless services or a payment for access to the wireless network.

43. Instead, as the evidence that was presented by the WSPs and consumer groups in the Wireless Code demonstrated, universally, the contractual agreement is that top-ups are funds deposited into consumers' accounts which the consumer may use at some future time in order to purchase specific wireless services such as voice calls, text messaging, Internet browsing, downloads of games, apps, etc. (See Appendix A)

44. The cash funds that consumers deposit into their prepaid wireless accounts must be recorded as a liability in the financial statements of the WSPs. Top-up funds do not constitute sales and cannot be reported as earnings by WSPs. It is only when customers actually use wireless services or acquire electronic goods that consideration is exchanged for services or goods, and the WSP can then enter the relevant amount expended as income.

45. The cash in customers' prepaid wireless accounts is used to pay for various wireless services as and when a particular service is used, or as and when a particular good is acquired. With this pay-per-use business model, the WSPs do not stipulate which services or goods the customer is to use or acquire. Nor do the WSPs stipulate what volume of each service can be used or volume of goods can be acquired; this is totally at the customer's discretion and is limited only by the cash available in the account. In other words, prepaid wireless services are not subject to usage limitations (other than the limitation imposed by the amount of funds available to be spent).
Prepaid Wireless Services Balance Expiry

46. WSPs apply expiry dates to top-ups according to the amount of the top-up payment. For example, Virgin Mobile Canada says a $15 top-up expires after 30 days; Telus says a $25 top-up expires after 60 days; Rogers says a $100 top-up expires after 365 days.

47. If a customer makes a top-up before the expiry date of the most recent top-up, any cash already in the account is preserved, and the cash balance is increased by the value of the new top-up.

48. However, if the customer does not make a top-up before the expiry date, the WSP seizes the entire cash balance in the customer’s account by claiming that the funds have “expired”.

49. The following examples illustrate how the practice of “expiring” the cash deposited in prepaid wireless accounts leads to losses by consumers. In the first example, there is no loss as the consumer makes a top-up before the expiry date. The account of a brand new customer who bought a $15 top-up on January 01 that would expire in 30 days would appear as follows:

<table>
<thead>
<tr>
<th>Date</th>
<th>Description</th>
<th>Cash balance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jan 01</td>
<td>Initial acquisition of prepaid services</td>
<td>$15</td>
</tr>
<tr>
<td>Jan 05</td>
<td>Browsed 40 pages (ie used $4 in services)</td>
<td>$11</td>
</tr>
<tr>
<td>Jan 31</td>
<td>Expiry day: make $15 top-up</td>
<td>$26</td>
</tr>
<tr>
<td>Feb 01</td>
<td>Day after expiry date: balance preserved</td>
<td>$26</td>
</tr>
</tbody>
</table>

50. If, however, the customer does not make a top-up before the expiry date, the WSP seizes the entire cash balance remaining in the customer's accounts. For example, the account of a brand new customer who bought a $15 top-up on January 01 that would expire in 30 days would appear as follows:

<table>
<thead>
<tr>
<th>Date</th>
<th>Description</th>
<th>Cash balance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jan 01</td>
<td>Initial acquisition of prepaid services</td>
<td>$15</td>
</tr>
<tr>
<td>Jan 05</td>
<td>Browsed 40 pages (ie used $4 in services)</td>
<td>$11</td>
</tr>
<tr>
<td>Jan 31</td>
<td>Expiry day: no further top-up made</td>
<td>$11</td>
</tr>
<tr>
<td>Feb 01</td>
<td>Day after expiry date: balance confiscated</td>
<td>$0</td>
</tr>
</tbody>
</table>

51. If a top-up is not made before the expiry of the most recent top-up, the WSP seizes all the cash in the customer's account. This includes cash that accumulated prior to the purchase of the most recent top-up bearing the expiry date. The account of a customer of four years, for example, who accumulated a balance of $300 over those previous four years, and who acquired a top-up on January 01 that expired in 30 days would appear as follows:

<table>
<thead>
<tr>
<th>Date</th>
<th>Description</th>
<th>Cash balance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dec 31</td>
<td>Accumulated balance from previous four years</td>
<td>$300</td>
</tr>
<tr>
<td>Jan 01</td>
<td>Acquisition of further $15 top-up</td>
<td>$315</td>
</tr>
<tr>
<td>Jan 05</td>
<td>Browsed 40 pages (ie used $4 in services)</td>
<td>$311</td>
</tr>
<tr>
<td>Jan 31</td>
<td>Expiry day: no further top-up made</td>
<td>$311</td>
</tr>
<tr>
<td>Feb 01</td>
<td>Day after expiry date: balance confiscated</td>
<td>$0</td>
</tr>
</tbody>
</table>

52. Thus, the customer loses a total of $311 on the expiry date.
53. An expiry date purports to entitle the WSP to confiscate the remaining cash balance on the top-up associated with such a date. However, the above example clearly demonstrates that WSPs confiscate prior accumulated cash funds which are entirely unrelated to the most recent top-up.

**The Wireless Code Proceeding**

54. With Telecom Notice of Consultation CRTC 2012-557, the CRTC initiated a proceeding to develop the Wireless Code (the “Wireless Code Proceeding”). At paragraph 15 of the Notice, the CRTC stated its preliminary view that the Wireless Code should address, among other things, the clarity of WSPs’ contract terms and conditions; and the clarity of advertised prices, “including a provision that service providers may not charge consumers for optional mobile wireless services they have not ordered”.

55. The Wireless Code Proceeding included a two-phase online consultation as well as a public hearing, which took place from February 11 to 15, 2013. Following the oral portion of the Wireless Code Proceeding, participants in the hearing submitted Final Written Comments and Final Replies.

56. The CRTC received comments from over 5,000 participants, including hundreds of individual Canadians, as part of the online consultation and interventions in the Wireless Code Proceeding.

57. Some two dozen WSPs participated, including Bell, Rogers, and Telus, as well as the industry organization, the Canadian Wireless Telecommunications Association. DiversityCanada and the Public Interest Advocacy Centre (“PIAC”) were among about half a dozen consumer advocacy groups which participated.

58. During the proceeding, various representatives of the wireless sector submitted that prepaid wireless balance expiry was justified as the funds were taken as payment for access to the wireless network.4

59. Their argument was as follows: The acquisition of a top-up creates a time-plus-usage agreement allowing the consumer access to the provider's wireless system. Activation of a top-up starts the clock ticking on that access. When the time runs out on the access period, the unused portion of the balance is taken by the WSP as consideration for the access provided.

60. DiversityCanada presented evidence of WSPs' promotional materials which advertised prepaid wireless pay-per-use account balances as cash balances that are to be used by customers – at the customers' discretion – to make purchases from among a variety of goods and services available via the wireless networks.

61. DiversityCanada submitted, therefore, that when consumers acquire top-ups, they do not purchase anything at that point (ie they do not hand over consideration for access to the wireless network for specified services over a specific period of time), but, instead, are depositing cash into their account to be used to pay for services and goods only as and when they use wireless services of their choice and acquire goods of their choosing.

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4 Telecom Regulatory Policy CRTC 2013-217, paras. 342 - 345
DiversityCanada also noted that customers with prepaid monthly plans also have pay-per-use cash balances (ie customers who pay their monthly service fee and further add top-ups in order to purchase extra services) and that these pay-per-use cash balances are also seized by the WSPs under the pretext of balance expiry.

DiversityCanada argued that for prepaid pay-per-use customers, the WSPs' claim that top-ups were consideration for “access to system for specified services during a specific time period” could not be inferred because: i) the WSPs' promotional material showed there was no offer of the nature claimed by the WSPs, and, therefore, ii) there was no acceptance by consumers of any offer of the nature claimed by the wireless providers.

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 of the most recent top-up;
* 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.

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 CRTC to prohibit prepaid wireless balance expiry in order to ensure prepaid wireless customers enjoyed the protections they were entitled to under provincial laws.

The Wireless Code Decision

On June 03, 2013, the CRTC released Telecom Regulatory Policy CRTC 2013-271, which presented the Wireless Code Decision. In the Wireless Code Decision, the CRTC made little mention of the arguments and evidence presented by DiversityCanada on the issue of the prohibition of prepaid wireless balance expiry.

The following paragraph from the Wireless Code Decision contains the entirety of the CRTC's summary of DiversityCanada's position on the issue of prepaid wireless balance expiry:

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 time frame allotted should roll over indefinitely).
68. The CRTC's analysis of the issue of prepaid wireless balance expiry and its determination in the Wireless Code Decision is as follows:

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.

69. Furthermore, Section J of the Wireless Code reads as follows:

Expiration of prepaid cards
1. General
   (i) A service provider must keep open the accounts of customers with prepaid cards for at least seven calendar days following the expiration of an activated card, at no charge, to give the customer more time to “top up” their account and retain their prepaid balance.

Application to Review and Vary the Wireless Code Decision

70. On September 03, 2013, DiversityCanada filed an application (on its behalf and on behalf of the NPF) to review and vary Section J of the Wireless Code. (Hereinafter, the consumers groups will be referred to as “the Petitioners”.)

71. In the Part I Application, the Petitioners submitted that the CRTC:

a) failed to provide sufficient support (ie reasons to explain its findings of fact to the standard the Court has established is required of administrative tribunals) in the Wireless Code Decision with respect to prepaid wireless balance expiry and, therefore, breached its duty of procedural fairness;
b) ignored relevant facts (ie evidence presented by consumer groups and the WSPs, themselves, which demonstrated that top-up are presented to the public as “funds” consumers “deposit” into their accounts, to be used at the consumer's discretion to purchase wireless services) and, therefore, arrived at an unreasonable conclusion (that top-ups were payments for “access to the network for a specific period of time with specific usage limitations”); and

c) failed to consider the basic principle of unjust enrichment with respect to the seizure of prior accumulated balances that are unrelated to the purported “expired” top-ups, a principle which was included the Wireless Code Proceeding by paragraph 15 of the Notice (ie the CRTC's statement that the Wireless Code should address, among other things, the clarity of WSPs’ contract terms and conditions; and the clarity of advertised prices, “including a provision that service providers may not charge consumers for optional mobile wireless services they have not ordered”).

The Petitioners requested in the Part I Application that the CRTC:

i) rescind Section J of the Wireless Code;

ii) hold a new hearing before a differently constituted panel on the subject of the expiration of prepaid wireless 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 balances;

iv) grant the Petitioners' reasonable costs.

**Telecom Decision CRTC 2014-101**
*(Denial of Application to Review and Vary the Wireless Code Decision)*

On March 05, 2014, the CRTC issued Telecom Decision CRTC 2014-101 in which it denied the Petitioners' request to review and vary the Wireless Code Decision.

In its decision denying the review and vary application, the CRTC noted that in the Wireless Code Proceeding it received submissions from over 5,000 individuals and organizations, and considered approximately 25 topics related to the content and clarity of retail wireless service contracts. The CRTC stated that given the scope of the issues considered and the number of submissions received, “the Commission could not reasonably be expected to address specifically in its decision every piece of evidence and argument put forward in the proceeding. In order to produce a concise Wireless Code Decision, the Commission necessarily summarized the positions, evidence, and arguments made by all parties”.

The CRTC then concluded that “in the circumstances of the proceeding, the Commission considers that it provided sufficient rationale for its determinations (i) to allow expiry dates on prepaid cards, and (ii) to require wireless service providers to give their customers seven days’ notice of that expiration in order to ensure that customers receive sufficient notice to top up their accounts if they so choose”.

The CRTC also found that the terms of prepaid wireless services “are subject to both usage and time limits”.
Additionally, the CRTC concluded that “to the extent that the issue of unjust enrichment is related to the reasonableness of the rates being charged by wireless service providers for the services provided, the Commission notes that it was not within the scope of the proceeding”.

**Telecom Order CRTC 2014-220**  
(Deferral of Costs re Application to Review and Vary the Wireless Code Decision)

On December 02, 2013, the Petitioners filed an application for costs for participating in the review and vary application. On May 8, 2014, the CRTC issued Telecom Order CRTC 2014-220 denying the Petitioners's application for costs.

The CRTC's determination was as follows:

20. The Commission considers that DiversityCanada’s submissions in the review and vary proceeding, given the record and the reasons underpinning the Commission’s disposition of the issues in the Wireless Code proceeding, raised no genuine issue for the Commission’s consideration. Consequently, the Commission determines that DiversityCanada did not assist the Commission in developing a better understanding of the matters that were considered in that proceeding.

21. Given this, DiversityCanada does not fulfill the criteria for an award of costs and cannot be eligible for such an award in the review and vary proceeding. This being the case, it is not necessary for the Commission to determine whether DiversityCanada has participated in the review and vary proceeding in a responsible way.

**Application to Review and Vary Telecom Order CRTC 2014-220**

On August 1, 2014, the Petitioners filed an application requesting that the CRTC review and vary Telecom Order CRTC 2014-220, in which the CRTC denied the Petitioners' costs for participation in the proceeding that led to Telecom Decision CRTC 2014-101.

The Petitioners submitted that there was substantial doubt as to the correctness of Telecom Order CRTC 2014-220, on the grounds that

i) it was contrary to the CRTC's stated intention with respect to its costs award procedures;

ii) it was contrary to an Alberta Court of Appeal's ruling, in *Kelly v Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19, concerning the costs award procedure before an administrative tribunal similar to the CRTC; and

iii) it was based on erroneous findings.

(As the Petitioners had submitted a Petition to the Governor in Council on the third ground, submissions on that point were included merely so that they would be placed on the record of the proceeding, but were not intended for consideration by the CRTC.)
The Petitioners requested that Telecom Order CRTC 2014-220 be varied so as to approve the Petitioners' application for costs for participating in the proceeding that led to Telecom Decision CRTC 2014-101.

The Petitioners also requested that the CRTC grant their costs for filing the Part I Application to review and vary Telecom Order CRTC 2014-220.

THE DECISIONS THAT ARE THE SUBJECT OF THIS PETITION

**Telecom Decision CRTC 2015-131**
*(Denial of Application to Review and Vary Telecom Order CRTC 2014-220)*

85. On April 09, 2015, the CRTC issued Telecom Decision CRTC 2015-131 in which it denied the Petitioners' request to review and vary Telecom Order CRTC 2014-220.

86. The salient passages of the decision are quoted as part of the submissions below. The full text of the decision is included as Appendix B.

**Telecom Order CRTC 2015-132**
*(Denial of Costs re Application to Review and Vary Telecom Order CRTC 2014-220)*

87. On October 14, 2014, the Petitioners filed an application for costs for participating in the review and vary application concerning Telecom Order CRTC 2014-220.

88. On April 09, 2015, the CRTC issued Telecom Order CRTC 2015-132 denying the Petitioners' application for costs.

89. The salient passages of the decision are quoted as part of the submissions below. The full text of the decision is included as Appendix C.
III. SUBMISSIONS

1. The Governor in Council has the authority to review this Petition

90. The Governor in Council has the authority to review and make a decision on this Petition because a) the Governor in Council is tasked with upholding the rule of law; and b) the Petition is brought before the Governor in Council on valid and appropriate grounds; and c) consideration of the Petition is necessary to protect the public interest.

a) The Governor in Council is tasked with upholding the rule of law

91. Section 12 of the Telecommunications Act, S.C. 1993, c.38 (the “Act”) authorizes the Governor in Council to review decisions of the CRTC on being petitioned in writing within 90 days of the decision.

92. In considering this Petition, the Governor in Council may act as both an administrative and a quasi-judicial body. Regardless of whether it is acting in an administrative or quasi-judicial role, the Governor in Council is always tasked with upholding the rule of law and must be seen to be doing same.

93. As stated by the Supreme Court of Canada, all exercises of public authority must find their source in law. When performing in a quasi-judicial capacity, the Governor in Council must ensure the legality, reasonableness and fairness of the CRTC’s administrative process and outcomes.

b) The petition is brought before the Governor in Council on valid and appropriate grounds

94. The grounds for bringing this petition before the Governor in Council are both valid and appropriate, and are based on two pre-established practices.

95. First, they are based on the pre-established practice of requesting a review and variance of CRTC decisions before the CRTC itself when there has been (i) an error in law or fact; or (ii) a failure to consider a basic principle which had been raised in the original proceeding.

96. Second, they are based on the pre-established practice of requesting the Federal Court of Appeal to grant relief if the Court is satisfied that the CRTC (i) failed to observe a principle of natural justice, procedural fairness or other procedure it was required by law to observe; (ii) erred in law in making a decision or an order, whether or not the error appears on the face of the record; and (iii) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

5 Attorney General of Canada v. Inuit Tapirisat et al., [1980] 2 SCR 735
6 “By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.” [Emphasis added] Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 SCR 190; para. 28 (“Dunsmuir”)
7 The Act, Section. 62; and Telecom Information Bulletin CRTC 2011-214 Section 5 (i) and (iii)
8 Federal Courts Act RSC 1985, c F-7, Section 18.1(4)(b-d); and Section 64. (1) of the Telecommunications Act (which grants interested parties the right to bring in the Federal Court of Appeal – with the leave of that Court
c) **Consideration of the Petition is necessary to protect the public interest**

97. The Petitioners submit that consideration of the Petition is necessary to protect the public interest since the decisions in question imperil the integrity of the CRTC's costs award procedures.

98. The Petitioners submit that the cost of participating in regulatory hearings is a strain for most ordinary Canadians. Therefore, both individual telecommunications subscribers and the CRTC, itself, must largely rely on public interest groups if subscriber concerns are to be represented in CRTC proceedings.

99. The Petitioners submit that, generally speaking, public interest groups are not large, well-funded organizations with the capacity to underwrite the cost of participating in CRTC proceedings. Thus, the CRTC's costs award procedures are essential to ensuring Canadians have access to the CRTC's procedures to protect their rights as telecommunications consumers, and to ensuring the CRTC fulfills its mandate as a forum in which telecommunications consumers may be heard.

100. The Petitioners submit that, as demonstrated below, in the decisions that are the subject of this Petition, the CRTC deviated from the guidelines established by the CRTC for its costs award procedures. This departure undermines the intent and integrity of the CRTC's costs award procedures.

101. The Petitioners submit that the decisions that are the subject of this Petition run the risk of leading to unjust outcomes and of having a chilling effect on public participation in the CRTC's procedures.

102. The Petitioners therefore submit that the public policy considerations of ensuring access to justice for telecommunications consumers and ensuring that the CRTC's outcomes are just and reasonable require that the Governor in Council review this Petition and vary the decisions that are the subject of this Petition to provide the requested relief.

2. **The Standard of Review**

103. In keeping with the approach set out by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, questions of law, and questions of mixed law and fact which engage the mandate and expertise of an administrative tribunal and its decisions on them are entitled to deference. A reviewing body would interfere with such decisions only if they are found to be unreasonable.

104. The decisions that are the subject of this Petition involve the interpretation and application of the *Telecommunications Act* and the CRTC's *Rules of Procedure*, and thus raise questions of law, and questions of mixed law and fact which engage the mandate of the CRTC.

105. Therefore Telecom Decision CRTC 2015-131 and Telecom Order CRTC 2015-132 should be reviewed to assess whether they are reasonable.

[– an appeal from a decision of the CRTC on any question of law or of jurisdiction)
3. The CRTC erred in misinterpreting the Supreme Court of Canada's determination as to whether the CRTC's cost award procedures should be governed by the general principle of indemnification found in the Court

106. The Petitioners submit that in Telecom Decision CRTC 2015-131, the CRTC erroneously took the position that the Supreme Court of Canada (“SCC”) had ruled that the CRTC was entitled to treat its costs award procedures in the same manner that a Court treats costs awards.

107. Specifically, the CRTC erroneously took the view that – unlike other administrative tribunals whose costs award procedures are directed towards encouraging public participation in matters of public interest – the CRTC is entitled to apply the indemnification principles underlying costs in litigation between parties before a Court, where the “winner” is compensated.

108. The CRTC stated in Telecom Decision CRTC 2015-131:

   22. The Commission agrees that the purpose of costs awards granted by administrative tribunals is to encourage public participation in their proceedings. However, the Supreme Court of Canada has held that, in the Commission’s case, this power is similar to the power of a court to award legal costs (see Bell Canada v. Consumers’ Association of Canada et al., [1986] 1 S.C.R. 190). [Emphasis added]

109. The Petitioners submit that this interpretation of the SCC’s ruling is erroneous. Furthermore, The Petitioners submit that, ironically, the position taken by the CRTC in Telecom Decision CRTC 2015-131 (as quoted above) is contrary to the arguments presented by the CRTC before the SCC in the cited 1986 case.

110. In normal civil litigation, under the general principle of indemnification, a Court would generally award costs to the “winner” to partly compensate for the expenses of the action. In this scenario, the Court awards costs based on the outcome, or the “success” of the parties.9

111. In the SCC ruling which the CRTC relied upon, the SCC affirmed that the general principle of indemnification that applies in a Court applied to the CRTC in so far as “costs” should be interpreted to mean compensation to parties for expenses incurred by parties for their participation in CRTC procedures.10

112. The SCC said:

   I would agree that the word "costs" in s. 73 must carry the same general connotation as legal costs. It cannot be construed to mean something quite different from or foreign to that general sense of the word, such as an obligation to contribute to the administrative costs of a tribunal or the grant of a subsidy to a participant in proceedings without regard to what may reasonably be considered to be the expense incurred for such participation. Thus I am of the opinion that the word "costs" must carry the general connotation of being for the purpose of indemnification or compensation. 11

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9 Kelly v Alberta (Energy Resources Conservation Board), 2012 ABCA 19; para. 31 (“Kelly”)
10 Such an interpretation ruled out, for example, the possibility that the CRTC could, itself, incur an expense and then attempt to impose this expense as a “cost” on a party. Bell Canada v. Consumers’ Assoc. of Canada, [1986] 1 SCR 190, 1986 CanLII 49 (SCC); para. 29
11 Ibid; para. 30
113. However, while accepting that “costs” should mean “legal costs” as found in the Court (ie compensation to parties for expenses incurred for participation in an action), in the 1986 matter before the SCC, the CRTC's position was that the basis upon which a Court awards legal costs was inappropriate for the CRTC’s regulatory proceedings. The SCC quoted the CRTC as stating:

In the Commission's view, the application of the principle of indemnification upon which Bell relies [ie the principle of indemnification as applied by a Court] would not be appropriate in regulatory proceedings before it. In the Commission's opinion, the proper purpose of such awards is the encouragement of informed public participation in Commission proceedings.  [Emphasis added]

114. The SCC agreed with the position taken by the CRTC in the 1986 case, and concluded:

... What the Commission did reject, as I read its reasons and those of the taxing officer, was the contention that in its application of the general principle of indemnification or compensation it should be governed by the authorities reflecting the application of that principle in the courts. In doing so, it did not in my opinion err in law, so long as it adopted a reasonable approach....  [Emphasis added]

115. Thus, the Petitioners submit that the CRTC erred in interpreting the SCC's 1986 ruling to mean that the CRTC's power in its costs award procedure was “similar to the power of a court to award legal costs”, in the sense that the CRTC's costs award procedures were not similar to costs award procedures of administrative tribunals where the purpose is to encourage public participation in their proceedings.

116. The Petitioners submit that the CRTC's erroneous interpretation resulted in the CRTC concluding that it was entitled to act like a Court (which compensates the “winner” in a matter) by denying costs solely or primarily on some measure of perceived “success” of an intervention.

117. As discussed further below, in Telecom Decision CRTC 2015-131, the Petitioners submit that the CRTC erroneously ignored the Kelly decision in which the Alberta Court of Appeal concluded that an administrative tribunal directed towards ascertaining and protecting the public interest should not act like a Court by denying costs solely or primarily on some measure of perceived “success” of an intervention. The Court determined such a decision would not be reasonable.

118. The Petitioners submit that the CRTC's misinterpretation of the SCC ruling in Bell Canada v. Consumers’ Association of Canada et al resulted in an unreasonable outcome, and therefore, Telecom Decision CRTC 2015-131 should be varied to allow the Petitioners' costs.

12 Ibid; para. 19
13 Ibid; para. 30
4. The CRTC erred in not giving sufficient weight to the principles relevant to cost award procedures before administrative tribunals as outlined by the Alberta Court of Appeal

119. The Petitioners submit that in Telecom Decision CRTC 2015-131, the CRTC erred when it summarily rejected the *Kelly* ruling by the Alberta Court of Appeal, in which that Court outlined principles that have general applicability to the cost award procedures of administrative tribunals.

120. The CRTC stated in Telecom Decision CRTC 2015-131:

> 23. The decision cited by DiversityCanada deals with a provincial administrative tribunal operating pursuant to its enabling provincial statute. As such, the Commission considers that the cited decision is of very little assistance in the present case.

121. In the cited decision referred to here (i.e., *Kelly*), the Court looked at the facts of the case and sought to answer the following question: was it reasonable for the administrative tribunal to deny costs solely or primarily on some measure of perceived “success” of the intervention? The Court found it was unreasonable since the administrative tribunal's procedures were primarily directed at ascertaining and protecting the public interest, and its costs award procedures were established to facilitate public participation in its procedures.\(^{14}\)

122. The Petitioners submit that the CRTC erred in narrowly focusing on the facts of the case (i.e., the home statute of the administrative tribunal whose decision was reviewed by the Court). In doing so, the CRTC unreasonably ignored the general principles outlined by the Court concerning costs awards before administrative tribunals directed at ascertaining and protecting the public interest, such as the CRTC.

123. The Petitioners submit that in any matter that is adjudicated, the facts would be specific to that particular case; however the *reasoning* of the adjudicator would be either binding upon or instructive to other adjudicators considering similar matters. The Petitioners, therefore, submit that it was not reasonable for the CRTC to focus on the facts of the cited case (the enabling provincial statute) and to ignore the reasoning of the Court, which has general applicability to administrative tribunals directed at ascertaining and protecting the public interest, such as the CRTC.

124. During the proceeding that led to Telecom Decision CRTC 2015-131, the Petitioners submitted to the CRTC that the general applicability of the *Kelly* decision to administrative tribunals was acknowledged in a 2014 decision by the Alberta Surface Rights Board ("ABSRB").

125. While noting that *Kelly* involved a different tribunal, the ABSRB based its decision in *Canadian Natural Resources Limited v. Babb, 2014 ABSRB 39* on the principles outlined in *Kelly*. In awarding costs to “unsuccessful” costs applicants, the ABSRB cited paragraph 31 of *Kelly*, and said:

\(^{14}\) *Kelly*; para. 28 to 37
While it is true that [the ABSRB] Panel ultimately did not accept a number of the arguments presented on behalf of the Respondents, the Panel considers that the circumstances made presenting those arguments and the associated evidence a reasonable course of action.15

The Petitioners further submit that it was unreasonable for the CRTC to ignore the *Kelly* decision as this ruling was entirely in keeping with the finding of the SCC and with the CRTC's own prior determinations.

As noted above, in *Bell Canada v. Consumers' Assoc. of Canada*, the SCC endorsed the CRTC's view that the proper purpose of its costs award procedures was the encouragement of informed public participation in its proceedings, and the strict application of the indemnity principles of the Court was not desirable.

Furthermore, in updating its costs award procedures in the proceeding that led to Telecom Regulatory Policy CRTC 2010-963 ("TRP CRTC 2010-963"), the Commission considered the request by the industry that costs be denied when a claim is made in relation to an unsuccessful application brought forward by a costs applicant under Part VII of the Telecommunications Rules or Part 1 of the Rules of Procedure. The Commission stated, at paragraph 26 of the decision that led to TRP CRTC 2010-963:

> The Commission considers that automatically denying costs when a costs applicant’s application under Part VII of the Telecommunications Rules or Part 1 of the Rules of Procedure has not been successful could have a chilling effect on those who wish to raise issues of public interest. The Commission finds that its current approach of assessing each costs application on its merits remains appropriate.

15 The ASRBRB further affirmed the general applicability of the *Kelly* decision. In *TAQA North Ltd. v. SL Developments Inc.*, 2013 ABSRB 989 the ASRBRB said:

> In *Kelly v. Alberta (Energy Resources Conservation Board)* the court stated:

> While there are certainly some adversarial aspects to the hearings before the Board, the Board processes are not primarily directed towards identifying “winners and losers”; as the Board notes in its factum, its hearings are directed at the public interest. In ascertaining and protecting the public interest, there are, in one sense, no winners or losers. It follows that it is unreasonable to award costs in Board proceedings solely or primarily on some measure of perceived “success” of the intervention. Since one of the primary purposes of public hearings is to allow public input into development, all interventions are “successful” when they bring forward a legitimate point of view, whether or not the ultimate decision fully embraces that point of view. The process of the hearing is an end of itself.

> “Although that decision is an appeal from a different tribunal, it is persuasive authority that success should not be a primary factor in determining the costs payable.”

And in *Poole Farming Co. Ltd. v. Encana Corporation*, 2013 ABSRB593, the ASRBRB said:

> “...the Panel was guided by *Kelly v. Alberta (Energy Resources Conservation Board)*. Although *Kelly* is an appeal from the Energy Resources Conservation Board, the principles in that decision are relevant in the present case. The court decided that success should not be the primary factor when determining costs. The most important factor when determining costs is whether it was reasonable for the party incurring the costs to believe their evidence may sway the outcome of the hearing: Further, an intervener should not have to predict correctly at the time of intervention what the ultimate outcome of the hearing will be....It is sufficient if, at the beginning of the process, it is reasonable to believe that the evidence “may” disclose an adverse effect.”
The Petitioners submit that this demonstrated that the intent of the CRTC was that eligibility for costs was not to be based on some measure of perceived success by the applicant in the substantive proceeding. Rather, the CRTC's costs award procedures were intended to facilitate those who wish to raise issues of public interest – an intention shared by the costs award procedures of administrative tribunals in general, which the Kelly decision underlined.

The Petitioners submit, therefore, that the CRTC erred in ignoring both the Kelly decision and the decision of another administrative tribunal (ABSRB) which demonstrated that the principles outlined by the Alberta Court of Appeal have general applicability to administrative tribunals such as the CRTC.

The Petitioners respectfully submit that in ignoring the Kelly decision, the CRTC came to an unreasonable decision to deny the Petitioner's costs and, therefore, Telecom Decision CRTC 2015-131 should be reversed.

5. The CRTC erred in determining that the Petitioners did not meet the eligibility criterion of contributing to a better understanding by the Commission of the issues under consideration on the basis that the CRTC did not accept the Petitioners' arguments in the substantive matter

The Petitioners submit that the CRTC erred in determining that the Petitioners did not meet the eligibility criterion of contributing to a better understanding by the Commission of the issues under consideration on the grounds that the CRTC did not accept the Petitioners arguments in the substantive matter. This was the sole basis on which the CRTC denied the Petitioners' costs application.

In the original decision denying costs for the Petitioners' participation in the application to review and vary the Wireless Code decision, the CRTC stated:

20. The Commission considers that DiversityCanada’s submissions in the review and vary proceeding, given the record and the reasons underpinning the Commission’s disposition of the issues in the Wireless Code proceeding, raised no genuine issue for the Commission’s consideration. Consequently, the Commission determines that DiversityCanada did not assist the Commission in developing a better understanding of the matters that were considered in that proceeding.

21. Given this, DiversityCanada does not fulfill the criteria for an award of costs and cannot be eligible for such an award in the review and vary proceeding. This being the case, it is not necessary for the Commission to determine whether DiversityCanada has participated in the review and vary proceeding in a responsible way. 16 [Emphasis added]

The Petitioners filed for a review and variance of that decision on the basis that the ground articulated by the CRTC was invalid.

In response, the CRTC issued Telecom Decision CRTC 2015-131 (which is the subject of this Petition), stating:
17. The Commission considers that, in DiversityCanada’s application to review and vary the Wireless Code decision, DiversityCanada did not provide any argument of merit to support its position. This means that DiversityCanada did not meet the eligibility criterion of contributing to a better understanding by the Commission of the issues under consideration. The key issue under consideration was whether there were serious arguments in favour of DiversityCanada’s application to review and vary the Wireless Code decision.

18. Since DiversityCanada failed to meet this criterion, the Commission determined that DiversityCanada would not be awarded any costs, and there was no need for the Commission to consider the criterion set out in paragraph 68(c) of the Rules of Procedure. [Emphasis added]

136. A determination of this nature was squarely addressed by the Alberta Court of Appeal in the above-mentioned Kelly decision. The Court ruled that it was not reasonable for the administrative tribunal in the case to find that a party was disentitled to (or ineligible for) costs on the basis that the tribunal did not fully embrace the party’s submissions in the substantive matter.

137. The Court found that such a determination of ineligibility on the basis of some measure of perceived success of the applicant's submissions in the substantive matter could not stand because it was contrary to the intention of costs award procedures of an administrative tribunal that was directed towards the public interest. The Court stated:

34. ... Granting standing and holding hearings is an important part of the process that leads to development of Alberta’s resources. The openness, inclusiveness, accessibility, and effectiveness of the hearing process is an end unto itself. Realistically speaking, the cost of intervening in regulatory hearings is a strain on the resources of most ordinary Albertans, and an award of costs may well be a practical necessity if the Board is to discharge its mandate of providing a forum in which people can be heard. In other words, the Board may well be “thwarted” in discharging its mandate if the policy on costs is applied too restrictively.

138. In the same way, the CRTC's regulatory proceedings are intended to provide a forum in which Canadian telecommunications consumers, including vulnerable consumers, can be heard. Similarly, the CRTC would be thwarted in discharging its mandate if its costs award policy is applied in a manner that not only is too restrictive, but is contrary to the stated intent of the CRTC's costs award policy.

139. The Petitioners submit that in determining that costs should be denied because the Petitioners “raised no genuine issue for the Commission’s consideration” or “did not provide any argument of merit to support its position”, the CRTC based its decision on a measure of perceived success of the Petitioners' submissions in the review and vary application, contrary to the principles outlined in the Kelly decision:

“In normal civil litigation costs generally go to the “winner”. Civil litigation occurs in a fully adversarial context, and costs awards are designed to encourage settlement, and reasonableness and efficiency in litigation, and to partly compensate the winning party for the expenses of the action. While there are certainly some adversarial aspects to the hearings before the Board, the Board processes are not primarily directed towards identifying “winners and losers”; as the Board notes in its factum, its hearings are directed at the public interest. In ascertaining and
protecting the public interest, there are, in one sense, no winners or losers. It follows that it is unreasonable to award costs in Board proceedings solely or primarily on some measure of perceived “success” of the intervention. Since one of the primary purposes of public hearings is to allow public input into development, all interventions are “successful” when they bring forward a legitimate point of view. The process of the hearing is an end of itself.” [Emphasis in the original]

140. Furthermore, the Petitioners submit that the CRTC’s denial of costs on the basis that the Petitioners “raised no genuine issue for the Commission’s consideration” or “did not provide any argument of merit to support its position” was contrary to the intent and spirit of the CRTC’s own determinations in establishing its costs award procedure (as seen above in paragraph 26 of the decision that led to TRP CRTC 2010-963, and in the CRTC’s arguments presented in the 1986 Bell case before the SCC).

141. The Petitioners submit that the CRTC’s guidelines provide a clear indication that it was never intended that the criterion of contributing to a better understanding of matters considered would include assessing how far the CRTC embraced the applicant's arguments in the substantive matter, but, rather, that it was intended that this criterion should assess the manner in which those arguments and any evidence were presented by the costs applicant.

142. At paragraph 6 of TRP CRTC 2010-963, the CRTC provided examples of what would be considered when ascertaining whether an applicant for costs contributed to a better understanding of the issues:

In evaluating whether an applicant has contributed to a better understanding of the issues, the considerations that the Commission will generally take into account include:

(a) whether the applicant filed evidence;
(b) whether the contribution was focused and structured; and
(c) whether the contribution offered a distinct point of view.

143. Given the above, the Petitioners submit that an applicant fulfills the requirement of contributing to a better understanding by the Commission when it presents its arguments and any evidence in a comprehensive and logical manner that enables the CRTC to know applicant's point of view in the substantive matter, whether or not the CRTC embraces that point of view.

144. The Petitioners submit that, as can be seen in Appendices D, E, and F; and in the summaries provided in paragraphs 58 – 60 and 68 – 72 above; and in sections 7 and 9 below, in the procedures for which costs were denied, the Petitioners filed close to 100 pages of arguments and evidence that were comprehensively researched, that were focused and structured, and that offered a distinct point of view. The Petitioners, therefore, submit that they fulfilled the requirement of contributing to a better understanding by the Commission as set out in TRP CRTC 2010-963.

145. The Petitioners submit that the CRTC was in error when it interpreted the eligibility criterion of contributing to a better understanding by the Commission to mean “convince the Commission as to the merits of the applicant's point of view in the substantive matter”.

146. The Petitioners submit that in Kelly, the Court underscored the point that a costs applicant is eligible for costs – not because it convinces the tribunal of its point of view – but because it participated in a proceeding in which there was a prima facie case to be heard by the tribunal:
32. ...If a costs award is to be primarily based on the “success” of the intervention, there would be no need to consider if the hearing “may” disclose such an effect. The use of the word “may” is inconsistent with the idea that hindsight should be a primary factor in awarding costs. Further, an intervener should not have to predict correctly at the time of intervention what the ultimate outcome of the hearing will be. As this hearing demonstrated, all the evidence, and its full impact, are never completely known until the hearing is over. It is sufficient if, at the beginning of the process, it is reasonable to believe that the evidence “may” disclose an adverse effect.

35. ...any reasonable decision of the Board respecting costs is not subject to appellate review. However, it is not reasonable to require physical damage to the lands to establish eligibility for costs, nor is it reasonable to make an award of costs overly dependent on the outcome of the hearing.

37. ... For clarity, a potential adverse impact on the use and occupation of lands is sufficient to trigger entitlement to costs. [Emphasis added]

147. As noted above, when public interest groups file a Part I application, the CRTC has the authority to not allow a proceeding to go forward if it determines that the application does not disclose a prima facie case. As recently as July 28, 2014, the CRTC exercised this power when it closed the file on a Part I application by the Public Interest Advocacy Centre to review and vary Telecom Decision CRTC 2014-349.

148. In allowing a Part I proceeding to go forward, the CRTC explores the possibility that the grievances raised in the prima facie case are valid.

149. The Petitioners highlight that circumstances made it necessary and reasonable that the Petitioners apply to the CRTC to seek redress for the grievances in question – namely, the loss of an estimated $138 to $372 million per year by some 3.6 million consumers, including some of the most vulnerable Canadians, due to practices the Petitioners argued were illegitimate.

150. The Petitioners submit that in allowing the Petitioners' Part I applications to go forward, the CRTC established that there was a prima facie case that there were potential adverse impacts on telecommunications consumers.

151. The Petitioners submit that this was sufficient to trigger the Petitioners' entitlement to costs and that it was not reasonable for the CRTC to find that the Petitioners were not eligible for costs on the basis that the CRTC did not eventually embrace the Petitioners' point of view.

152. The Petitioners further submit that the CRTC's decision is not reasonable, in accordance with principles set down by the Court in rulings, such as Montreal (City) v. Montreal Port Authority, 2010 SCC 14, 2010 SCC 14, [2010] 1 S.C.R. 427; and Canada Canada (Transport, Infrastructure and Communities) v. Farwaha, 2014 FCA 56. In the latter decision, the Court stated:

[100] One way of assessing whether a decision is reasonable – a “badge of reasonableness,” so to speak – is to assess whether it is consistent with the purposes of the provision authorizing the decision and the purposes of the overall legislation....

153. The Petitioners therefore submit that it was unreasonable for the CRTC to determine that the Petitioners did not contribute to a better understanding of matters that were considered on the basis that the CRTC did not embrace the Petitioners' point of view, since such a determination is inconsistent with the CRTC's intentions in establishing this criterion.
154. The Petitioners respectfully submit that Telecom Decision CRTC 2015-131 should be varied so as to allow the Petitioners' costs.

6. It is unreasonable for the CRTC to deny costs solely or primarily on its determination of the merits of the arguments in the substantive matter as this alters the nature of the costs award procedure, and sets the stage for unjust outcomes

155. The Petitioners submit that it is unreasonable for the CRTC to base its determination in a costs award procedure solely or primarily on its determination on the merits of the arguments in the substantive matter as this alters the nature of the costs award procedure, and sets the stage for unjust outcomes

156. The Petitioners submit that, as demonstrated in section 5 above, the intention of a costs award procedure is to determine an applicant's eligibility for costs, based on the manner in which the applicant presented its arguments and evidence to the CRTC to enable the CRTC to understand the applicant's point of view. Therefore, in a costs award procedure, the burden on a costs applicant is to show that the applicant presented comprehensive arguments and evidence in a focused and structured manner; that it presented a distinction point of view; and that it acted responsibly.

157. The Petitioners submit that in making the merits of the arguments presented by the costs applicant in the substantive matter the sole or primary basis on which to determine costs, the CRTC unreasonably upsets the burden upon a costs applicant. Instead of having to prove the merits of its costs application, the costs applicant would be required in its costs application to re-litigate the substantive matter and convince the CRTC of the merits of the arguments and evidence presented in the original procedure.

158. The Petitioners submit that it is not reasonable for the CRTC to require a costs applicant to litigate the substantive matters of the original procedure in order to be deemed to be eligible for an award of costs.

159. Furthermore, the Petitioners submit that it is unreasonable for the CRTC to deny costs solely or primarily on the basis that the CRTC did not embrace a costs applicant's arguments in the substantive matter as this sets the stage for unjust outcomes.

160. As seen in section 5 above, the CRTC established eligibility criteria (eg presenting evidence, providing focused and structured contributions; presenting a distinct point of view) for its costs award procedures. The Petitioners submit that it would be an unjust and unreasonable outcome if a costs applicant satisfied all the eligibility criteria for an award of costs and yet was denied costs solely or primarily on the basis that the CRTC did not accept the applicant's arguments in the substantive matter, as a reviewing body may well find that the CRTC erred in determining the applicant's arguments in the substantive matter were without merit.

161. The Petitioners respectfully submit that this is the case with the decisions that are the subject of this Petition. The Petitioners highlight that in their Part I Application to review and vary Telecom Decision 2014-101, the Petitioners outlined the grounds on which they submitted that that decision was based on erroneous findings. That decision, which prompted the review and vary application for which costs were sought, was the subject of a Petition to the Governor in
Council. The Petitioners consider the matter to be live and subject to further review; in pursuing this course, Petitioners respectfully submit that that decision will eventually be overturned.

162. The Petitioners submit that it was unreasonable for the CRTC to deny the Petitioners' costs solely on the basis that it did not embrace the Petitioners' arguments in the substantive matters and, therefore, the decisions that are the subject of this Petition should be varied so as to allow the Petitioners' costs.

7. The CRTC erred in finding that the Petitioners added “no new substantive elements to the Commission's deliberations in its factual submissions”

163. The Petitioners submit that the CRTC made an error in determining that the Petitioners added “no new substantive elements” to the deliberations and, therefore, should be denied costs. In Telecom Decision CRTC 2015-131, the CRTC said:

26. The Commission finds that DiversityCanada added no new substantive elements to the Commission's deliberations in its factual submissions

in the review and vary proceeding that led to Telecom Decision 2014-101;

in the proceeding that led to Telecom Order 2014-220; and

in the present review and vary proceeding.

Accordingly, the Commission finds that DiversityCanada has failed to demonstrate substantial doubt as to the correctness of the Commission’s denial of costs set out in Telecom Order 2014-220, and that there is therefore no basis on which to grant the costs claimed by DiversityCanada. The Commission therefore denies DiversityCanada’s application to review and vary Telecom Order 2014-220. [Emphasis added]

164. The Oxford Dictionary defines the adjective “new” as “[p]roduced, introduced, or discovered recently or now for the first time; not existing before”.18

165. The Oxford Dictionary defines the adjective “substantive” as “[h]aving a firm basis in reality and so important, meaningful, or considerable”.19

166. The issue here, therefore, was 1) whether the Petitioners introduced elements that had not been brought to the CRTC’s attention before as the tribunal deliberated on the matters under consideration; and 2) were the elements presented by the Petitioners important or meaningful to the deliberation of the matters that were before the CRTC.

167. The CRTC does not provide a reviewing body any assistance in assessing how the CRTC answered these questions because, apart from making the blanket statement that the Petitioners “added no new substantive elements”, the CRTC does not state what elements are being referred to; where these elements were presented to the CRTC prior to the Petitioners’ including them in their submissions; and how these elements were not important or meaningful to the

18 http://www.oxforddictionaries.com/definition/english/new (The Oxford Dictionary provides several definitions of the word “new”, but the Petitioners submit that the one quoted is most appropriate given the context of the CRTC decision.)

19 http://www.oxforddictionaries.com/definition/english/substantive
deliberation of matters under consideration.

The Petitioners submit that the following sample demonstrates that the CRTC's determination that the Petitioners added “no new substantive elements” to the deliberations was erroneous.

The review and vary proceeding that led to Telecom Decision 2014-101:

This was a proceeding to review and vary the Wireless Code Decision. The Wireless Code Proceeding concerned the introduction of rules to govern wireless contracts. The Wireless Code proceeding therefore did not entail any examination of an administrative tribunal's obligation to provide reasons in its decisions.

In filing for a review and variance of the Wireless Code Decision, the Petitioners were required to show that there was substantial doubt as to the correctness of the decision. The Petitioners asserted that the Wireless Code Decision was not correct because, among other things, it failed to meet the requirement that an administrative tribunal provide reasons for a decision.

To support this position, the Petitioners presented the CRTC with arguments and analysis based on principles set down in the following Court rulings, with quotes of salient passages:

- Baker v. Canada (Minister of Citizenship and Immigration), 1999 2 SCR 817
- Clifford v. Ontario (Attorney General), 2008 ON SCDC
- Re Canada Metal Co. Ltd. et al. and MacFarlane, 1973 1 O.R. (2d) 577

The Petitioners submit that these are among the leading authorities on the obligation of administrative tribunals to provide reasons for a decision, and that these authorities were thus important and meaningful to the CRTC's deliberation as to whether an absence of reasons in the Wireless Code decision raised substantial doubt as to the correctness of that decision. Prior to the Petitioners including the above rulings in their application to review and vary the Wireless Code decision, these authorities had not been part of the CRTC's deliberations.

The Petitioners therefore submit that this demonstrates that the CRTC erroneously and unreasonably determined the Petitioners did not add any new, substantive elements to the CRTC's deliberations.

The review and vary proceeding that led to Telecom Decision 2015-131:

This was a proceeding to review and vary Telecom Order 2014-220. In that decision, the CRTC denied the Petitioners costs for their participation in the just-outlined proceeding. That proceeding concerned whether the CRTC had met its obligation to provide reasons for the Wireless Code Decision and other errors that the Petitioners asserted had been made. That proceeding, and the Wireless Code Proceeding before it therefore did not entail any examination of costs award procedures before an administrative tribunal.

See Appendix D: Submissions in the Procedure that led to Telecom Order CRTC 2014-220
In filing for a review and variance of Telecom Order 2014-220, the Petitioners were required to show that there was substantial doubt as to the correctness of the decision. The Petitioners asserted that Telecom Order 2014-220 was not correct because it was contrary to the intentions for which the CRTC's discretion to award costs had been established, and that the CRTC had erroneously determined the Petitioners were ineligible for costs based on some measure of perceived success (or lack thereof).

To support this position, the Petitioners presented the CRTC with arguments and analysis based on principles set down in the following Court rulings and a decision of an administrative tribunal, with quotes of salient passages:

- *Canada (Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56
- *Kelly v Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19
- *Canadian Natural Resources Limited v. Babb*, 2014 ABSRB 39

The Petitioners submit that these are among the leading authorities that establish that a discretionary decision may be reversed if it is contrary to the intention for which the discretion was granted; and that it is unreasonable for an administrative tribunal to find an applicant ineligible for costs based on some measure of perceived success of an intervention. As such, the Petitioners submit that these authorities were important and meaningful to the CRTC's deliberation as to whether there was substantial doubt as to the correctness of Telecom Order 2014-220. Prior to the Petitioners' including the above rulings in their application to review and vary Telecom Order 2014-220, these authorities had not been part of the CRTC's deliberations.

The Petitioners therefore submit that this demonstrates that the CRTC erroneously and unreasonably determined the Petitioners did not add any “new, substantive elements” to the CRTC's deliberations. As this determination was not reasonable, the Petitioners submit it should be varied so as to allow the Petitioners' costs.

8. The CRTC erred in finding in Telecom Order CRTC 2015-132 that the Petitioners were ineligible for an award of costs

In Telecom Order CRTC 2015-132, the CRTC stated:

23. The Commission accepts that DiversityCanada represented a group or class of subscribers that had an interest in the outcome of the review and vary proceeding. However, for the reasons that follow, the Commission finds that DiversityCanada has not satisfied the criterion for an award of costs set out in paragraph 68(b) of the Rules of Procedure.

24. Specifically, the Commission considers that DiversityCanada's arguments in the review and vary proceeding did not raise genuine issues for the Commission's consideration. As well, the Commission considered the legal precedents that DiversityCanada cited in the review and vary proceeding and dismissed them since they were based on a separate legislative framework. [Emphasis added]

21 See Appendix E: Submissions in the Procedure that led to Telecom Decision CRTC 2015-131
180. The submissions in sections 2 to 7 above are the grounds on which the Petitioners submit that in Telecom Order CRTC 2015-132, the CRTC erred in determining that the Petitioners were not eligible for an award of costs.

9. The CRTC erred in finding that the Petitioners did not offer a distinct point of view

181. The Petitioners submit that the CRTC made an error in determining that the Petitioners did not offer a distinct point of view and therefore did not assist the CRTC in developing a better understanding of the matter that was under consideration.

182. The CRTC stated in Telecom Order CRTC 2015-132:

25. The Commission considers that DiversityCanada’s submissions in the review and vary proceeding did not offer a distinct point of view and therefore did not assist the Commission in developing a better understanding of the matters that were considered in that proceeding.

183. The Oxford Dictionary defines the word “distinct” in the following manner:

Recognizably different in nature from something else of a similar type

184. A distinct point of view, therefore, would be one that is that is recognizably different in nature from other points of view in the same proceeding.

185. The participants in the proceeding which led to Telecom Order CRTC 2015-132 were Telus Telecommunications Company, the Canadian Wireless Telecommunications Association (CWTA), and the Petitioners.

186. Telus participated to present its point of view as a corporation engaged in providing telecommunications services. The CWTA participated to present its point of view as the body that represents various corporations engaged in providing telecommunications services.

187. The Petitioners were the only party which presented the point of view of consumers, and thus, indisputably offered a distinct point of view.

188. The CRTC's finding in Telecom Order CRTC 2015-132 deviates from past practice, such can be seen in Telecom Order CRTC 2012-340, in which the CRTC stated:

16. The Commission also notes Bell Canada et al.’s submission that PIAC’s award of costs should be reduced because PIAC did not substantially contribute to a better understanding of the issues raised in the proceeding. The Commission considers that PIAC provided a distinct point of view as the only party representing the interests of consumers, and that PIAC’s submissions were structured and focused. Accordingly, the Commission finds that PIAC contributed to a better understanding of the issues raised in the proceeding. [Emphasis added]

189. The Petitioners, therefore, respectfully submit that the CRTC's finding in Telecom Order CRTC 2015-132 that the Petitioners did not present a distinct point of view, was in error, and unreasonable, and renders the decision to deny the Petitioners' costs reversible.

http://www.oxforddictionaries.com/definition/english/distinct
10. **The CRTC's determination that the outside consultant's fees should be reduced was based on invalid grounds**

190. The Petitioners submit that the CRTC's determination that the outside consultant fees should be reduced was based on invalid grounds. This determination was therefore unreasonable, and should be set aside.

191. Telecom Order CRTC 2015-132 stated:

28. Had the Commission awarded any costs, it would likely have reduced the amounts claimed for the following reasons:

* the outside consultant fees set out in the supporting documentation to DiversityCanada’s application for costs are excessive;

* DiversityCanada provided minimal background information as to why outside consultant fees were claimed. No resumes were provided, nor were any professional certifications that would indicate that the outside consultant had expertise in the field of wireless telecommunications, the economics underlying prepaid cards, or telecommunications regulation; and

* DiversityCanada also failed to provide evidence to support the necessity of retaining an outside consultant with special knowledge.

192. Presumably, the reasons the CRTC considered the outside consultant's fees to be “excessive” are those listed in the second and third bulleted paragraphs.

a) **The CRTC arbitrarily ignored the outside consultant's background and experience in this particular costs application, whereas it had recognized same in several other costs applications**

193. The CRTC determined the outside consultant's fees were excessive because “[n]o resumes were provided, nor were any professional certifications that would indicate that the outside consultant had expertise in the field of wireless telecommunications, the economics underlying prepaid cards, or telecommunications regulation”.

194. The Petitioners submit that this determination was unreasonable as the CRTC arbitrarily ignored the outside consultant's qualifications and experience in this particular costs application, whereas it had recognized the outside consultant's qualifications and experience in five other costs award decisions since September 2013.

195. In fact, in Telecom Order CRTC 2013-520, the CRTC considered this very question of the appropriate rate for this outside consultant. In the costs award procedure that led to Telecom Order CRTC 2013-520, Bell Canada had argued that the outside consultant, Ms. Sankar, was not entitled to the rates claimed on the basis that Ms. Sankar did not have 25 years of experience in the field of telecommunications.23 The CRTC rejected Bell's objection and made the following determination:

23 Telecom Decision CRTC 2015-211; para. 9   http://www.crtc.gc.ca/eng/archive/2015/2015-240.htm
16. With respect to Ms. Sankar’s experience, the Commission considers that her long career as a journalist, researcher, and writer for media, government, and business clients, while not directly related to the telecommunications industry, is sufficiently relevant to Commission proceedings for her to be treated as a consultant within the broad definition contemplated by the Commission’s Guidelines for the Assessment of Costs (the Guidelines), as set out in Telecom Regulatory Policy 2010-963. The Commission therefore considers that the rates claimed in respect of consultant and analyst fees are in accordance with the rates established in the Guidelines. [Footnote marker omitted]

196. The CRTC subsequently approved the outside consultant's costs in Telecom Order CRTC 2014-351; Telecom Order CRTC 2014-433; Telecom Order CRTC 2014-536; and Telecom Order CRTC 2015-130 (which was released on the same day that the CRTC issued the decision under review, arbitrarily determining the outside consultant's rate should be reduced).

197. In all these decisions, the rate claimed by the outside consultant was the same as the rate claimed in the costs award procedure under review in which the CRTC arbitrarily determined that the outside consultant's rate should be reduced.

198. The Petitioners further submit that the issues under consideration in the substantive matter for which costs were sought concerned administrative law (rather than technical or economic wireless telecommunications issues) and thus required competence in researching and writing submissions on administrative law (under supervision by legal counsel). The Petitioners therefore submit that the fees claimed by the outside consultant in the procedure which led to Telecom Order CRTC 2015-132 were in accordance with the costs guidelines established by the CRTC, at the time the costs application was filed.

199. The Petitioners submit that the CRTC unreasonably ignored the Petitioners' submissions on this point, which were made in the costs award procedure that led to Telecom Order CRTC 2015-132. In that costs award procedure, the Petitioners submitted to the CRTC that the Petitioners' legal counsel (who has 26 years' experience) is licenced by the Law Society of Upper Canada, and paragraph 1 of the commentary at section 6.1 of that body's Rules of Professional Conduct states: “Where a non-lawyer is competent to do work under the supervision of a lawyer, a lawyer may assign work to the non-lawyer.”

200. The Petitioners further submitted the following to the CRTC:

38) DiversityCanada/NPF's outside consultant earned a Master's (with distinction) in international journalism [from City University, London, England] and has 27 years of research and writing experience, including writing for major Canadian and international media organizations such as The Globe and Mail, the BBC, and the Associated Press. Her career required her to develop competence in quickly and efficiently sifting through large amounts of data for the important information, and in communicating complex subjects so that they are readily understood by readers of all backgrounds. Since 2011, DiversityCanada/NPF's outside consultant has been engaged in researching and writing on telecom issues and has developed a breadth and depth of knowledge on the business, technical, legal, and public policy aspects of the Canadian telecom sector.

39) With this training, experience, and subject matter expertise, DiversityCanada/NPF's outside consultant is competent to do the required work, under the supervision of legal counsel, to enable DiversityCanada/NPF to participate in Commission proceedings. Accordingly, DiversityCanada/NPF's legal counsel directly supervised the work of the outside consultant (a non-lawyer at a lower rate than the legal counsel), frequently reviewing the assigned work to ensure its proper and timely completion.

24 See http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147499502
25 See Appendix F: Submissions in the costs award proceeding that led to Telecom Order CRTC 2015-132
201. Given that in the procedure before it, the CRTC had submissions as to the qualifications and experience of the outside consultant and the appropriateness of same to the CRTC's procedures, and given the CRTC's prior determination that, based on the outside consultant's qualifications and experience, rates claimed were in accordance with the rates established in the CRTC's Guidelines in all prior costs award decisions, the Petitioners submit that the CRTC's determination in Telecom Order CRTC 2015-132 that the outside consultant's fees should be reduced was arbitrary and unreasonable, and, therefore, should be set aside.

b) The CRTC required resumes and professional certification for subject areas that were not considered in the proceeding for which the Petitioners applied for costs

202. The Petitioners submit that the CRTC's determination that the outside consultant's fees should be reduced was unreasonable as the proceeding on the substantive matter did not engage issues requiring expertise in wireless telecommunications or the economics underlying prepaid cards.

203. Telecom Order CRTC 2015-132 was a decision on an application for costs for a proceeding in which the Petitioners sought a review and variance of a prior decision to deny a previous application for costs. The narrow focus of that proceeding was the intention of costs award procedures of administrative tribunals directed towards the public interest, and, particularly, the CRTC's costs award procedures; and whether the CRTC's prior denial of the Petitioners' costs application deviated from that intention and, therefore, was unreasonable.

204. The proceeding for which costs were sought, therefore, did not engage technical matters in the field of wireless telecommunications, nor did it engage the economics underlying prepaid cards.

205. The Petitioners submit that it would be unreasonable to reduce a costs claimant's fees on the basis that the claimant did not provide resumes or professional certifications demonstrating expertise “in the field of wireless telecommunications” or “the economics underlying prepaid cards” when these subjects formed no part of the proceeding for which costs were sought.

206. The Petitioners submit, therefore, that the determination that the outside consultant's fees should be reduced should be set aside.

c) The requirement that costs applicants provide detailed justification for the use of an outside consultant was introduced after the Petitioners filed their costs application

207. In Telecom Order CRTC 2015-132, the CRTC determined the outside consultant's fees were excessive because the Petitioners “provided minimal background information as to why outside consultant fees were claimed” and “failed to provide evidence to support the necessity of retaining an outside consultant with special knowledge”.

208. The Petitioners submit that it was unreasonable for the CRTC to hold the Petitioners to an obligation to provide detailed evidence on the necessity of retaining an outside consultant when no such requirement existed at the time the application was filed on October 14, 2014.

209. It is only in Telecom Order CRTC 2015-130, released on April 09, 2015, that the CRTC determined that, from thenceforth, costs applicants would be required to include detailed
justification for the use of an outside consultant. In Telecom Order CRTC 2015-130, the CRTC stated:

16. **Going forward**, the Commission expects applicants that claim costs in respect of a consultant or analyst at the external rate to provide evidence to support the necessity of using an outside, as opposed to an in-house, analyst or consultant. For instance, the applicant may demonstrate that its full participation in the proceeding required it to temporarily retain the services of an outside specialist that the applicant could not financially justify employing in-house. Furthermore, the Commission expects these applicants to provide objective evidence that the external consultant or analyst possesses specialized knowledge or relevant experience that bears directly on the subject matter of the proceeding. [Emphasis added]

210. The Petitioners submit that it is an established principle of law that statutes, rules, and regulations are not to be deemed as having retrospective operation unless this is expressly indicated.


> The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively.

212. The Petitioners submit that the CRTC's use of the words “Going forward” expressly indicated that the requirement that costs applicants provide evidence to support the necessity of using an outside consultant was not to have retrospective operation. Instead, the CRTC's use of the words “Going forward” meant this requirement was apply to costs applications filed after the April 09, 2015 release of Telecom Order CRTC 2015-130.

213. The Petitioners therefore submit that the CRTC invalidly imposed on the Petitioners a requirement that was not in place at the time the Petitioners submitted their application for costs on October 14, 2014.

214. Accordingly, the Petitioners submit the determination that the outside consultant's fees were excessive and should be reduced because the Petitioners “failed to provide evidence to support the necessity of retaining an outside consultant with special knowledge” was unreasonable, and should be set aside.

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IV. RELIEF REQUESTED

215. The Petitioners request that Telecom Decision CRTC 2015-131 and Telecom Order CRTC 2015-132 be varied so as to award the Petitioners' full costs, with interest. The Petitioners therefore request that the Governor in Council issue an Order in Council requiring:

i) that the Petitioners' costs claims for their participation in the proceedings that led to Telecom Decision CRTC 2014-101 and Telecom Decision CRTC 2015-131 be immediately paid in full, with interest; and

ii) that the costs be apportioned as appropriate among the costs respondents, being

the Canadian Wireless Telecommunications Association (CWTA), and
Saskatchewan Telecommunications in the proceeding that led to Telecom Decision CRTC 2014-101;

and

CWTA, Rogers Communications Partnership, and TELUS Communications Company, in the proceeding that led to Telecom Decision CRTC 2015-131.

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