Federal Court  Cour fédérale

Date: 20220517

Docket: T-1335-21

Citation: 2022 FC 726

Toronto, Ontario, May 17, 2022

PRESENT: Mr. Justice Diner

BETWEEN:

TELUS COMMUNICATIONS INC.

Applicant

and

VIDÉOTRON LTÉE, BELL MOBILITY INC., BRAGG COMMUNICATIONS INC., CITYWEST CABLE AND TELEPHONE CORP, COGECO CONNEXION INC., COMCENTRIC NETWORKING INC., ECOTEL INC., IRISTEL INC., LEMALU HOLDINGS LTD., 1085459 ONTARIO LTD. O/A KINGSTON ONLINE SERVICES, MULTIBOARD COMMUNICATIONS INC., 508896 ALBERTA LTD. O/A NETAGO, NEXICOM INC., ROGERS COMMUNICATIONS CANADA INC., SASKATCHEWAN TELECOMMUNICATIONS, SOGETEL INC., STAR SOLUTIONS INTERNATIONAL INC., TBAYTEL, TERRESTAR SOLUTIONS INC., THOMAS COMMUNICATIONS LTD., VALLEY FIBER LTD., FIBRENOIRE INC. AND XPLORNET COMMUNICATIONS INC.

Respondents

and

ATTORNEY GENERAL OF CANADA

Intervener

JUDGMENT AND REASONS

[1] This is a judicial review of the determination, made by a delegate of the Minister of Industry [the Minister], that Vidéotron ltée [Vidéotron] was eligible to bid on set-aside spectrum in the 2021 3500 MHz spectrum auction [the Auction]. Consistent with the prescribed process, the set-aside eligibility determination [the Decision] was made on April 21, 2021 and shared with Vidéotron, but did not become public until the results of the Auction were released by the Department of Innovation, Science and Economic Development Canada [ISED] on July 29, 2021. The spectrum in question is critical for the development of fifth generation [5G] technology standards of cellular networks for mobile phones and other technologies across Canada.

[2] The Decision, which permitted Vidéotron to bid on and obtain set-aside spectrum in British Columbia, Alberta and Manitoba [together Western Canada], is now challenged by TELUS Communications Inc. [TELUS] on procedural and substantive grounds. For the reasons that follow, I find the set-aside eligibility assessment process and the Minister's decision to have been fair and reasonable, and will dismiss the Application.

I. Background

A. *Statutory Framework*

[3] Spectrum is a limited public resource that consists of electromagnetic waves of various frequencies, which facilitate the use of communication technologies and services including mobile phones, satellites, two-way radio and broadcasting. The Minister, to whom authority is conferred by the *Department of Industry Act*, SC 1995, c 1, the *Radiocommunication Act*, RSC 1985, c R-2 and the *Radiocommunication Regulations*, SOR/96-484, is responsible for spectrum management in Canada. Management of spectrum plays a critical role for Canada, fostering the growth of telecommunications and ensuring that radiocommunications services, from cellphones to air traffic control, are properly managed and free from interference.

[4] Section 7 of the *Telecommunications Act*, SC 1993, c 38 sets out the objectives of Canadian telecommunications policy, which include: rendering reliable, affordable, high quality telecommunications services accessible to Canadians in all regions of Canada; enhancing efficiency and competitiveness; stimulating research and encouraging innovation; and, fostering increased reliance on market forces (for s 7, and other statutory provisions referenced in these Reasons, see Annex A). The Canadian Radio-Television and Telecommunications Commission [CRTC], as prescribed in Part III of the *Telecommunications Act*, regulates telecommunications services including the approval of rates and conditions of service.

[5] Section 5(1) of the *Radiocommunication Act* confers broad powers on the Minister to, *inter alia*, issue licenses, fix and amend their terms and conditions, and to plan the allocation and

use of spectrum. These licenses are critical to the operation of any mobile phone network and are issued from time to time to telecommunication service providers by way of auctions. The bidding process for the attribution of licenses is competitive and s 5(1.4) of the *Radiocommunication Act* allows the Minister to prescribe rules, standards and conditions applicable to the system of competitive bidding.

B. *Spectrum Licenses*

[6] Spectrum licenses allow their holders to use specified frequencies within defined geographic areas. Service areas are divided and further subdivided based on “tiers.” Tier 1 is a single national service area covering all of Canada. Tier 2 consists of 14 large service areas covering the entire country, and in some cases corresponds to an entire province. For instance, British Columbia, Alberta, and Manitoba are each distinct Tier 2 service areas. Tiers 3 and 4, by contrast, consist of smaller regional, and more localized service areas, respectively. Tier 2 and Tier 4 service areas were relevant for the determination of eligibility to bid on set-aside spectrum in the Auction.

[7] The 2021 3500 MHz Auction was the latest in a series of four spectrum auctions that have taken place since 2008. The three prior auctions took place in the decade from 2008 through 2018, namely the ASW-1 (2008), ASW-3 (2015) and 600 MGz (2018) auctions. Consistent with the objectives of the *Telecommunications Act*, these spectrum auctions have included “pro-competitive measures”, intended to enhance competition among mobile phone service providers. The principles underlying the measures are found in *Framework for Spectrum*

Auctions in Canada, published in 2011 by ISED (then Industry Canada). Spectrum caps, for example, impose limits on the width of spectrum a particular licensee can hold.

[8] Spectrum set-asides, another pro-competitive measure, reserve a certain portion of spectrum for carriers who do not meet the definition of "national mobile service providers" [NMSPs]. An NMSP, by definition, holds more than 10% of the national market share. Currently, there are three NMSPs - TELUS, Bell and Rogers.

[9] The specific criteria for eligibility to bid on set-aside spectrum has varied in the 2008, 2015, 2018 and 2021 auctions. In 2008, eligibility for set-aside spectrum was reserved to new entrants, defined as those who held less than 10% of national wireless market share based on revenue. In 2015, set-aside eligibility rules were much more specific. They varied depending on the service areas in question, and potential bidders needed to already be providing commercial mobile wireless services and demonstrate specific network coverage in each relevant service area. In 2018, eligibility requirements for set-aside spectrum related to the provision of services, but were less stringent and less detailed than in 2015. For example, while set-aside eligible bidders had to be providing commercial telecommunications service in the relevant Tier 2 service areas, there was no minimum customer threshold or level of coverage requirement.

C. *2021's 3500 MHz Spectrum Auction*

[10] The 3500 MHz band of spectrum, as mentioned above, is crucial for the deployment of 5G mobile technology standards for cellular networks. 5G provides opportunities for innovative, interconnected and data intensive applications, operating at higher speeds and providing

increased bandwidth than prior standards. 5G requires large amounts of spectrum in a variety of frequency bands.

[11] The process leading to the 2021 Auction and the impugned set-aside eligibility assessment process began in 2019. In June 2019, ISED announced a public *Consultation on a Policy and Licensing Framework for Spectrum in the 3500 MHz Band*.

[12] Extensive consultations followed, involving broad participation by stakeholders across the country, including both TELUS and Vidéotron, which led ISED to make a series of policy decisions that would govern the Auction. In March 2020, ISED released the *Policy and Licensing Framework for Spectrum in the 3500 MHz Band* [the *Framework*]. This voluminous document sets out the policy underpinning of and ground rules for the Auction. The bidder application and qualification stage, which includes set-aside eligibility determinations (the subject of this judicial review); the bidding stage to obtain spectrum licenses; and the post-auction license renewal process, are all comprised within the *Framework*.

[13] To promote competition for the Auction, the *Framework* implemented a set-aside of 50 MHz of spectrum, consisting of approximately 25% of the spectrum up for auction, to be reserved for eligible service providers (which excluded NMSPs). The *Framework* referred to prior use of set-asides having contributed to growth and competiveness of regional providers. The *Framework* also referred to findings of the Competition Bureau citing the market power possessed by NMSPs, the high barrier to entry in certain areas, and the lower prices enjoyed by customers in areas where regional providers had established market share. Paragraphs 36-44 of

the *Framework*, in addition to other relevant excerpts referenced below, have been reproduced in Annex B to these Reasons.

[14] Eligibility to bid on the set-aside spectrum was established in "Decision D2" of the *Framework*. Decision D2 limited set-aside eligibility to service providers meeting the following description:

> Eligibility to bid on set-aside spectrum will be limited to those registered with the CRTC as facilities-based providers that are not national mobile service providers, and that are actively providing commercial telecommunications services to the general public in the relevant Tier 2 service area of interest, effective as of the date of application to participate in the 3500 MHz auction. Services that are regulated under the *Broadcasting Act* will not be considered as "commercial telecommunications services" for the purposes of set-aside eligibility, however all services that are regulated under the *Telecommunications Act* may qualify.
>
> [Decision D2, para 64 of the *Framework*; emphasis added.]

[15] It is important to note that the licenses were being issued for the more localized Tier 4 service areas, but the eligibility criteria above refer to a bidder providing services anywhere in the larger Tier 2 service area. A bidder interested in obtaining spectrum in the Tier 4 service area of Steinbach, Manitoba, for example, need only be actively providing commercial telecommunications services to the general public somewhere in the relevant Tier 2 service area of Manitoba, such as Winnipeg, to be eligible to bid on set-aside spectrum in Steinbach

[16] In response to concerns raised as to how "general public" would be defined, the *Framework* clarified that it could include "businesses, enterprises and institutions in addition to traditional 'residential customers', and that 'providers who are actively offering commercial

telecommunications services to any of these consumers will be considered set-aside-eligible as long as they meet the additional eligibility criteria'" (at para 60, *Framework*).

[17] In addition to set-aside spectrum, the *Framework* also imposed non-transferability measures. These were intended to ensure that set-aside licenses would not be transferrable to set-aside ineligible entities for at least five years of the license term, in order to strike a balance between deterring speculation – for example, by bidders intending to simply resell instead of actually deploying licenses – and awarding spectrum to entities who were positioned to use it.

[18] Potential bidders applying for set-aside eligibility would be required to demonstrate their eligibility by providing relevant documentation to ISED describing 1) the services offered in the relevant area; 2) the retail/distribution network; and, 3) how subscribers access services and the number of subscribers in the area (para 64, *Framework*).

[19] Section 12.5 of the *Framework* outlined that ISED would review the application forms and associated documents after the closing date for submissions of applications. During this initial review, ISED would identify any errors in the forms and determine whether any additional information related to affiliates or associated entities was required. For the purposes of set-aside eligibility applications, ISED would assess eligibility to obtain licenses in Tier 4 service areas based on the relevant Tier 2 service areas of interest. ISED could also make written requests for further information and could verify the information that was provided. Applicants who failed to comply with the written requests would be rejected. Rejected applications, including cases where

a response to a request was received but found to nevertheless be deficient, would be returned to the Applicant (paras 435-440, *Framework*).

[20] In December 2020, ISED published responses to questions, and updates about the Auction in *Responses to Clarification Questions on the Policy and Licensing Framework for Spectrum in the 3500 MHz Band* the [Clarification Document]. On March 15, 2021, the Clarification Document was updated to provide the following question and response regarding set-aside eligibility:

> **QUESTION 3.3: How does being an affiliate affect an applicant's set-aside-eligibility?**
>
> **RESPONSE 3.3:** An applicant may be eligible to qualify as a set-aside-eligible bidder based on the eligibility of its affiliated entities or, where an applicant is a partnership, on the eligibility of the partners who control the applicant.
>
> As long as the applicant itself is not affiliated with or controlled by a national mobile service provider, and where one or more affiliates or controlling partners of the applicant is registered with the Canadian Radio-television and Telecommunications Commission (CRTC) as a facilities-based provider, that applicant may be qualified as set-aside-eligible to bid in all licence areas where an affiliate or controlling partner is actively providing commercial telecommunications services to the general public in the relevant Tier 2 service area, as set out in section 6.1 of the Framework.
>
> All applicants must disclose their affiliates and, where applicable, any controlling partners of the applicant in their application form. Applicants who wish to be considered as set-aside-eligible bidders will have to indicate and explain for each licence area, if they are directly eligible or through which affiliate or controlling partner, they are eligible.
>
> [Emphasis added.]

[21] ISED's assessment of applications was a closed process, as had been the case in previous spectrum auctions. This was to ensure the integrity of the 3500 MHz Auction, and to protect confidential information provided in the applications. The Clarification Document indicated that ISED would not release, to the public, post-auction documentation regarding where bidders applied, or the basis upon which successful applications were granted. Response 2.11 of the Clarification Document provided:

> …as in past auction processes, a list of all qualified bidders, along with information related to their beneficial ownership, affiliates, and associated entities, will be made public via ISED's website in accordance with the timelines stated … The number of eligibility points, financial deposit amounts, and eligibility status, including set-aside eligibility, will not be published. ISED makes its rulings on applicant set-aside eligibility based upon the information provided by the applicant as assessed against the set-aside eligibility criteria in accordance with the Framework.
>
> [Emphasis added.]

[22] However, in accordance with Response 2.11 above, ISED did release a list of all qualified bidders to the public, along with information about their beneficial ownership, affiliates and associated entities.

D. *The 3500 MHz Auction*

[23] The Auction ultimately generated revenue of $8.91 billion for the Government of Canada.

[24] Vidéotron applied, and was ultimately determined eligible, to be a set-aside bidder in the Tier 2 service areas in question for this judicial review, Manitoba, Alberta and British Columbia,

on the basis of services provided by its affiliate, Fibrenoire Inc. [Fibrenoire]. On July 29, 2021, Vidéotron was the successful bidder for 128 set-aside licenses across 45 license areas in Western Canada.

[25] On August 3, 2021, TELUS wrote to ISED questioning the set-aside eligibility findings regarding Vidéotron and requesting a complete record of the material they filed.

[26] ISED responded with an August 11, 2021 letter explaining the finding that, based on a review of Vidéotron's application materials and verification of publicly available services, Vidéotron was eligible as a set-aside bidder in accordance with the *Framework* and Clarification Document. ISED also stated that in accordance with the prescribed process, it would not release Vidéotron's documentation.

[27] On August 26, 2011, TELUS commenced this application for judicial review.

E. *Procedural Background at the Federal Court*

[28] A motion for an interlocutory injunction to stay the issuance of the licenses to Vidéotron in Western Canada, brought in September 2021 by TELUS, was dismissed by Justice Grammond of this Court by Order and Reasons dated October 22, 2021 (*Telus Communications Inc. v. Vidéotron Ltée*, 2021 FC 1127 [*Telus v. Vidéotron*]).

[29] The Minister proceeded to issue the licenses assigned through the 3500 MHz Auction on December 17, 2021.

[30] The Attorney General of Canada [AGC] was granted leave to intervene in these proceedings, and initially did not produce a complete tribunal record due to confidentiality concerns expressed by Vidéotron. TELUS and Vidéotron each brought competing motions, for disclosure and confidentiality, respectively. Vidéotron's motion was dismissed by an Order of Prothonotary Tabib, dated December 6, 2021, which circumscribed the disclosure process for confidential information. Vidéotron appealed this order.

[31] Ultimately, the parties resolved their disagreement on consent and, on February 3, 2022, Justice Pentney issued a protective confidentiality Order pursuant to Rules 151 and 152 of the *Federal Courts Rules,* SOR/98-106. TELUS, Vidéotron and the AGC each thereafter provided a redacted public version, in addition to a confidential private version of their respective records. TELUS' affiant, Mr. Mulvihill, was allowed to access and provide evidence based on the full record. Vidéotron and the AGC also presented affiants, Messrs. Dennis Béland and Daniel Anderson respectively, both of whom, like Mr. Mulvihill, annexed extensive evidence to their Affidavits.

[32] The entire judicial review hearing proceeded in public before me, without any need to resort to *in camera* discussions. One of the other Respondents, Iristel Inc., provided their submissions in a public record, and without having had access to the confidential records of TELUS, Vidéotron and the AGC. Representatives of some of the other Respondents, along with other members of the public, also listened to the virtual hearing.

[33] Mindful of these individuals, the open court principle, and in the interests of the administration of justice remaining public, no confidential information from any of TELUS, Vidéotron or the AGC's confidential records is contained in these Reasons. As such, there are no redactions, nor any need for a confidential set of reasons to be released separately.

II. Decision under Review

A. *Vidéotron's Set-Aside Eligibility Application*

[34] Vidéotron's set-aside eligibility application, which formed part of the broader application to participate in the Auction that was required of all prospective bidders, consisted of completing a series of standardized forms established by ISED, attaching supporting documentation, and submitting the completed application confidentially on April 5, 2021.

[35] Vidéotron's application confirmed that: Fibrenoire was an affiliate registered with the CRTC as a facilities-based provider, indicated all of the Tier 2 areas where Vidéotron wished to apply for set-aside eligibility, and identified all of the Tier 4 areas where it was already providing commercial telecommunications services to the general public.

[36] Vidéotron also attached documentation marked as confidential to its application, which included detailed descriptions addressing how Vidéotron met the set-aside eligibility criteria, including: descriptions of the services offered by Vidéotron and Fibrenoire in their respective service areas as well as their sales and distribution networks, the numbers of clients served, and how those clients accessed their services.

B. *The Assessment and Verification Process*

[37] As indicated above, the *Framework* provided that ISED would review the completed forms and associated documents, assess eligibility and, if necessary, request further information and verify the information provided.

[38] The AGC's affiant, Daniel Anderson, a Manager in the Spectrum Licensing and Policy Branch at ISED, was responsible for the set-aside eligibility assessments of all applicants. He had also been responsible for leading the policy development for the 3500 MHz Auction. A form called "3500 MHz Auction Set-Aside Eligibility Assessment (Form 4)" the [Assessment Form] was used to record Mr. Anderson's evaluations of the 19 applications for eligibility as set-aside bidders, between the application deadline of April 6, 2021 and April 22, 2021, at which point a list of qualified bidders would be published.

[39] According to his Affidavit, Mr. Anderson began his assessment of Vidéotron's set-aside eligibility on April 7, 2021, the day after the application deadline, entering information from the application directly onto the Assessment Form. He verified that both Fibrenoire and Vidéotron were indeed registered with the CRTC as facilities-based providers, which is reflected on the Assessment Form.

[40] Vidéotron had indicated in its application that it qualified for set-aside in British Columbia, Alberta, and Manitoba through its affiliate, Fibrenoire. Vidéotron claimed that Fibrenoire had customers in each of these Western provinces as well as Northern Ontario, but did

not indicate who or where they were. Mr. Anderson testified that he wanted to verify the information provided by Fibrenoire about their services, including their distribution network in Western Canada, but was unable to do so using their website.

[41] As a result, Mr. Anderson states in his Affidavit that he asked Nancy Macartney, one of his ISED colleagues who was participating in the assessment and verification process, to contact Vidéotron to request further details. On April 9, 2021, Ms. Macartney sent a letter to Vidéotron through secure electronic post, citing the criteria set out in the *Framework* for establishing set-aside eligibility and requesting that detailed information be provided for each of four service areas, namely Northern Ontario, and the Western Canadian provinces at issue in this case - Manitoba, Alberta and British Columbia.

[42] On April 12, 2021, Mr. Béland, a Vice-President of Regulatory Affairs at Quebecor Inc. and Vidéotron's affiant in the present application, replied on behalf of Vidéotron. Mr. Béland's reply provided a more detailed description of the various categories of services provided by Fibrenoire in Western Canada, a list of customers, and detailed explanations of how business customers accessed the services, how equipment was distributed and what particular services were provided to each customer. One excerpt of the letter, for instance, reads as follows:

> [TRANSLATION]
>
> Fibrenoire is actively providing business telecommunications services to the general public in service areas 2-008, 2-009, 2-010, 2-012 and 2-013, as it currently provides symmetrical speed connectivity services over dedicated fibre links to retail business customers with commercial operations in these areas. In addition to these fibre connectivity services, a growing portion of Fibrenoire's customers also subscribe to services such as wireless backup connectivity and over-the-top networking applications.

. . .

For each of the four categories of service provided, Fibrenoire ensures that the customer's sites are connected to its backbone network through fibre access facilities (except for the minority of SD-WAN cases where coaxial cable or wireless facilities are used). Except in some areas of Toronto where Fibrenoire operates its own backbone Internet network, these fibre access facilities are sourced from business partners operating networks in the areas in question. However, even when it sources others' fibre access facilities, Fibrenoire provides the equipment on the customer's premises. Furthermore, in all cases, Fibrenoire is fully responsible for monitoring and managing the connectivity provided to the customer.

Subject to the availability of adequate facilities from its business partners, Fibrenoire is ready to provide telecommunication services anywhere in the service areas . . .

. . .

When a new retail business customer contacts Fibrenoire for the first time, they are immediately assigned to a dedicated sales representative. This representative works with the customer to assess their needs, determine the most appropriate service category and negotiate a service contract. Typically, multi-year service commitments are required to ensure the most advantageous pricing. The assigned sales representative will then personally see to the delivery and installation of the equipment at the customer's premises (see more details below) and will be available to the customer to resolve any activation issues that may arise. The sales representative also works with the customer on an ongoing basis to ensure that the service ordered continues to best meet the customer's needs.

Generally speaking, Fibrenoire's dedicated sales representatives are physically located in Quebec, as Fibrenoire's customers in the above-mentioned areas are most often branches of large Quebec companies that already have a well-established business relationship with the company. Nevertheless, Fibrenoire has a growing list of retail business customers headquartered outside of Quebec, who are well served by the Quebec-based sales experts.

[43] To verify that new business customers could obtain services from Fibrenoire in Western Canada, Mr. Anderson deposes that he placed two anonymous calls to Fibrenoire, using a blocked number. First, he posed as a potential business client with offices in Vancouver and Calgary and asked if Fibrenoire could provide services. The next day, he placed a second call posing as a potential business client with offices in Winnipeg and Thunder Bay. In both cases, Fibrenoire responded that it could offer internet services but that it would not be through Fibrenoire's own infrastructure, but rather arranged through third-party infrastructure.

[44] At the end of the Assessment Form for Vidéotron, Mr. Anderson recommended that Vidéotron be granted set-aside eligibility in all the service areas where it applied, including Western Canada. For each of the Tier 2 service areas in Western Canada, Mr. Anderson indicated, "Provides OTT [over the top] services to businesses through affiliate Fibrenoire" and at the end of the form he wrote "Provides internet services to business through Fibrenoire as wholesaler."

[45] Mr. Anderson deposes that on April 19, 2021, after completing his assessment, he met with ISED's Senior Director, Mathew Kellison [the Minister's delegate]. Mr. Anderson states that he explained his assessment of the application, the response received to ISED's written request, the verifications he had completed by telephone, and the rationale for his recommendation. He also states that Mr. Kellison indicated that he agreed that Vidéotron met the requirements for set-aside eligibility in each of the areas in which it had applied.

[46] The Minister's delegate made the Decision on behalf of the Minister on April 21, 2021, which is indicated on an internal document called "3500 MHz Auction Application Assessment Form" [the Compiled Assessment Form]. At the time the decision was made, the Minister's delegate had the completed Assessment Form, all materials provided to ISED by Vidéotron (including the April 12 letter cited at para 42of these Reasons) and the Compiled Assessment Form before him on a USB key (as noted in a Response to Undertaking email from the AGC, at p. 1106 of the Applicant's Record).

[47] The next day, April 22, 2021, ISED published its list of qualified bidders. The findings on set-aside eligibility were shared with each applicant but were not made public prior to the auction, in accordance with the *Framework* and the Clarification Document.

III. Issues and Analysis

[48] TELUS submits two arguments in support of their application for judicial review. First, TELUS argues that the Minister failed to respect the duty of procedural fairness that was owed. According to TELUS, ISED failed to adhere to the procedure it established for itself, and failed also to maintain adequate records of the steps taken in the assessment of Vidéotron's set-aside eligibility.

[49] Second, TELUS submits that the decision of the Minister was unreasonable. It argues that ISED's reasoning process was incoherent and lacked transparency, and that the determination could not be justified in light of the factual record and the *Framework's* set-aside eligibility criteria.

[50] TELUS argues that Vidéotron should be disqualified as a set-aside bidder in Western Canada, and that the spectrum licenses it won there should be revoked, and that a new auction should be held, for which Vidéotron should not be eligible to participate.

[51] The Respondents and the Intervener assert, on the other hand, that there were no flaws in either the reasonableness or fairness of the set-aside eligibility determination, and that this application should be dismissed.

A. *Standard of Review*

[52] While the Parties and the Intervener disagree on the outcome of this application, they agree on the applicable standards of review. First, with respect to the issue of procedural fairness, the Court must ask whether, having regard to all the circumstances, the procedure was fair and just (*Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at paras 54-56 [*CPR*]; *Ahousaht First Nation v. Canada (Indian Affairs and Northern Development)*, 2021 FCA 135 at para 31).

[53] Such an assessment often involves a consideration of the non-exhaustive list of factors outlined by the Supreme Court in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 [*Baker*], and entails assessing "with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed" (*CPR*, at para 54).

[54] The Parties also agree that the second issue entails considering whether the Minister's decision was reasonable. In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court set out a revised framework to determine the standard of review, whereby reasonableness is the presumptive standard. The Parties agree that there is no reason to depart from the reasonableness standard in this case.

B. *Preliminary Issues*

[55] I will begin my analysis with two preliminary matters that were raised by Vidéotron and TELUS respectively, namely (i) TELUS's lack of standing to bring the application, and (ii) the improper contents of the Anderson and Béland affidavits.

[56] First, Vidéotron asserts that TELUS has no standing to bring this judicial review because, as an NMSP, TELUS was not entitled to participate in the Auction for set-aside spectrum, and thus has no direct interest in the matter. TELUS contests this argument, asserting that they were directly affected by the breach to their right to a procedurally fair process. The AGC takes no position on the issue, but as TELUS points out, the AGC does acknowledge that the Minister had at least a minimal duty of procedural fairness toward TELUS.

[57] The second preliminary issue is TELUS' argument that the Affidavit evidence of Messrs. Anderson and Béland was inappropriate and seeks to impermissibly add to the tribunal record (paras 59-63, 65 and 68 of the Anderson Affidavit and para 47 of the Béland Affidavit).

(i) TELUS has direct standing to bring the application

[58] Section 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7, states:

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

Vidéotron argues that TELUS, as an NMSP, had no right to bid for set-aside spectrum, the eligibility assessment determination which it challenges in this judicial review.

[59] As a result, Vidéotron contends that TELUS is not directly affected by the matter in which it seeks relief. Vidéotron relies on *Soprema Inc. v. Canada (Attorney General)*, 2021 FC 732 [*Soprema*], which in turn relies on *CanWest MediaWorks Inc. v Canada (Health)*, 2007 FC 752 [*CanWest*] (aff'd 2008 FCA 207). *Soprema* and *CanWest* stand for the principle that for an applicant to be considered 'directly affected', the matter at issue must be one which adversely affects their legal rights, imposes legal obligations, or prejudicially affects them directly. Vidéotron relies on *Soprema*, and *CanWest* for the proposition that commercial or economic harm is not, in itself, sufficient to ground standing.

[60] Vidéotron also relies on other cases refusing standing due to a lack of adverse impact to legal rights, including *Novo Nordisk Canada Inc. v Canada (Health)*, 2019 FC 822 at paras 8-9, which held that commercial or economic harm is not sufficient to grant direct standing where the party's legal rights are not affected and the party is not prejudiced. Similarly, Vidéotron relies on *Ultima Foods Inc. v Canada (Attorney General)*, 2012 FC 799 [*Ultima Foods*] at paras 102-103,

where a licence granted to a third party for the importation of yogurt was held not to impose rights or obligations on another party.

[61] TELUS counters that having been an active participant both in the consultation and the bidding processes of the Auction, its legitimate expectations of procedural fairness were undermined by how the set-aside eligibility determination process unfolded. TELUS argues that *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116 [*Irving*] provides a complete answer to the standing issues.

[62] TELUS acknowledges that it was not eligible to bid on set-aside spectrum, but nevertheless points out that it competed directly against Vidéotron during the phase of the auction which concerned the assignment of spectrum frequencies. TELUS notes that all the participants in the Auction had to apply to qualify, and set-aside eligibility determinations were simply one component of the broader application process in which all prospective bidders participated. As a participant in the Auction, TELUS contends that it has standing on the basis of its expectation of a fair process.

[63] I agree that this is not a particularly compelling example of being directly prejudiced. It is especially telling that TELUS is not joined in pursuing this application by any of the set-aside eligible bidders who participated in the Auction, who would have had a relatively greater interest in seeing set-aside eligibility determinations being made fairly, and who would have been even more directly affected by bidding directly against Vidéotron for set-aside spectrum. Their silence in this application has not gone unnoticed.

[64] Nevertheless, I find that TELUS has a sufficient basis to assert that its legal rights are affected, and to ground its standing to bring this Application, on account of its arguments regarding the procedural unfairness of the ISED process. Even if the content of the duty owed to it is found to be minimal, the fact that TELUS participated actively in the consultation leading to the Auction, and indeed, applied and participated in the Auction itself, there is no denying that they had a direct interest in the entirety of the Auction process being conducted fairly. In *Irving*, Justice Evans wrote at para 28:

> In my view, the question of the appellants' standing should be answered, not in the abstract, but in the context of the ground of review on which they rely, namely, breach of the duty of procedural fairness. Thus, if the appellants have a right to procedural fairness, they must also have the right to bring the matter to the Court in order to attempt to establish that the process by which the submarine contract was awarded … violated their procedural rights. If [the government department] owed the appellants a duty of fairness and awarded the contract to [the contract bid winner] in breach of that duty, they would be "directly affected" by the impugned decision. If they do not have a right to procedural fairness, that should normally conclude the matter.

[65] I note that in *Ultima Foods*, which Vidéotron relies on, the circumstances were distinguishable. There, the applicants, firms in the Canadian yogurt market, opposed import permits that allowed another Canadian yogurt processor to import yogurt into Canada. The Court did not accept that the applicants would be directly affected or experience prejudice as a result of the decision to grant the import permits, despite their claims that the decision threatened their businesses, and would reduce revenues and threaten the supply chain of Greek yogurt in Canada. The Court held the applicants did not have standing because they were only going to be impacted economically by the permits being awarded to the prospective yogurt importer.

[66] Vidéotron further argues that Justice Grammond already dismissed TELUS' economic arguments on the market distortion impact of the Auction in *Telus v. Vidéotron*,at paras 69-77. I agree with Justice Grammond's finding as it pertains to his assessment of the irreparable harm component of an interlocutory injunction. However, I cannot agree that TELUS' failure to establish irreparable harm in their injunction application amounts to a finding that the result of the Auction did not have any direct financial impact. The impossibility of predicting the outcome or quantifying the financial impact of an Auction scenario where Vidéotron was determined not to be eligible to bid on set-aside spectrum in Western Canada, does not inexorably lead to a finding that TELUS suffered no direct financial impact.

[67] Furthermore, unlike *Ultima Foods*, TELUS was not simply a competitor on the sidelines of an administrative process that did not concern them. TELUS, though admittedly not eligible to bid on set aside spectrum, was nonetheless a direct participant in the broader Auction and, as I will discuss further below, had a legitimate interest in the entire process being conducted fairly.

[68] As such, I am not prepared to accept Vidéotron's invitation to find the Court has no jurisdiction to hear the application. Having said that, establishing standing, and proving unfairness, are two completely different matters.

(ii) TELUS' Objections to the Affidavits of Messrs. Béland and Anderson

[69] As I do not find it necessary to refer at all to the affidavit of Vidéotron's affiant, Mr. Béland, to dispose of this application, I will limit my comments on this issue to the impugned sections of the Anderson affidavit, namely, paragraphs 59-63, 65 and 68.

[70] TELUS argues that it was inappropriate for Mr. Anderson, a key ISED representative involved in the selection process, to provide the evidence contained in the impugned paragraphs of his affidavit which was commissioned approximately nine months after the Decision was made. TELUS cites *Canada v. Kabul Farms Inc.*, 2016 FCA 143 at para 38 [*Kabul Farms*] and *Leahy v. Canada (Citizenship and Immigration)*, 2012 FCA 227 [*Leahy*] at para 145, for the proposition that supporting affidavits on judicial review cannot be used as an after-the-fact means of augmenting or bootstrapping the reasons of the decision-maker.

[71] TELUS accordingly requests that the Court disallow paragraphs 59-63, 65, and 68 of the Anderson (AGC) Affidavit. Those paragraphs are reproduced at Annex C of these Reasons.

[72] The AGC counters that admission of the Anderson Affidavit is both proper and necessary in these circumstances, since it meets two of the exceptions which allow for admission of affidavit evidence on judicial review: (a) to describe the background circumstances of the highly administrative Auction selection, and (b) to counter the allegations of procedural unfairness raised by the Applicant. The AGC contends that for both (a) and (b), the information is otherwise unavailable, and in neither case does it bootstrap or attempt to shore up the Decision with any additional reasons or justification for the conclusion. Rather, the AGC submits that the affidavit provides important evidence as to how the process was conducted, how the decision was made, the steps taken and how information was communicated.

[73] Broadly speaking, TELUS is correct that a well accepted principle of administrative law restricts the evidentiary record on judicial review to that which was before the administrative

decision-maker (*Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*] at para 19; *Leahy*, at para 145).

[74] However, there are exceptions to this rule as the AGC points out. For example, parties can file affidavits on judicial review which provide "general background in circumstances where that information might assist [the Court] in understanding the issues relevant to the judicial review" (*Access Copyright*, at para 20; see also *Delios v. Canada (Attorney General)*, 2015 FCA 117 at paras 43-45 [*Delios*]; *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263 at para 22-28).

[75] I agree with the AGC that the entirety of Mr. Anderson's Affidavit, including the impugned paragraphs, are helpful and orienting in providing general background information to the Court on the underlying administrative context and the decision-making process conducted by ISED for the Auction. This is especially so given the tight timeframes and confidentiality concerns that were inherent to the process, which had implications for the way it was conducted. Mr. Anderson describes the steps and practices followed by him and his team with respect to form completion, eligibility assessment, information verification and confidential correspondence, as well as final approvals.

[76] Given the circumstances, this information assists the Court to better understand the set-aside eligibility determination process and further, to consider the procedural fairness arguments that have been raised, in context. The Affidavit does not provide any additional reasons or

justification not included in the Decision, nor does it stray into opinion or facts not within the affiant's knowledge. I will accordingly decline to disallow or strike the impugned paragraphs of the Anderson Affidavit. It is admitted it in its totality.

[77] As an aside, I note that the Anderson Affidavit stands in stark contrast to the one produced by TELUS's affiant, Mr. Mulvihill, a former ISED employee now employed by TELUS, upon which TELUS relied heavily. Mr. Mulvihill's testimony was largely concerned with his perception of the underlying intentions that lead to the development of the *Framework*, informed by his prior employment at ISED, which coincided with the 2018 600 MHz auction. He did not participate in eligibility determinations in either the 2018 or 2021 auctions, or the development of the *Framework* itself. Though he was not qualified as an expert witness, significant portions of Mr. Mulvihill's affidavit and subsequent cross-examination stray consistently into argument and opinion on the intentions leading to the *Framework* and the appropriate interpretation of the set-aside eligibility criteria, views, which I must add, are simply not born out by the *Framework* or Clarification Document.

[78] As I was neither asked to formally disregard or strike any paragraphs of the Mulvihill Affidavit, I have considered it alongside the testimony of Mr. Anderson, to the extent that the information can be considered relevant, reliable and known to the affiant.

C. *Procedural Fairness*

[79] After reading the records of the participants in this judicial review, and considering the applicable jurisprudence, I am satisfied that the Minister's set-aside eligibility determination

process and the manner in which it was conducted was fair and just having regard to all the circumstances. I set out my reasons for that finding here.

[80] According to TELUS, an application of the *Baker* factors (set out in *Baker,* at paras 23-28), suggests that the set-aside eligibility determination attracts a significant degree of procedural fairness. The Applicant relies on the fact that neither the *Radiocommunication Act* nor the applicable ISED policies provide a mechanism for review or appeal of the Decision, combined with the importance of the impact of the Decision for TELUS' own interests, and the public interest more broadly.

[81] TELUS also submits that the Minister undertook to abide by a specific procedure, whereby it would assess whether applicants met the set-aside eligibility criteria by requiring documentation of the services being offered in the relevant service area, the retail/distribution network and the number of subscribers in the service area. The publication of these eligibility criteria in advance, following an extensive public consultation process, created - in TELUS's submission - legitimate expectations that the procedure set out by Minister would be followed.

[82] The Respondents and Intervener all counter that the *Baker* factors would more appropriately lead to a conclusion that the degree of procedural fairness owed to TELUS was minimal, and that in any event, ISED adhered to all the rules in the procedure it set out for itself, and the process was entirely fair.

[83] The non-exhaustive list of *Baker* factors were recently summarized at para 77 of *Vavilov* as including: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker (see also *Baker*, at paras 23-27; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650, at para. 5).

[84] I am unpersuaded that a significant degree of procedural fairness was owed to TELUS in the process leading to set-aside eligibility determinations, given the *Baker* factors, reviewed in sequence below.

(i) The nature of the Decision was purely administrative

[85] Having reviewed and considered the *Framework* more broadly and the actual set-aside eligibility criteria in particular, in addition to the Clarification Document, the forms associated with the application, and Mr. Anderson's Affidavit, I conclude that the nature of the Decision, namely the assessment of applicants' eligibility to bid on set-aside spectrum, was a straight forward and purely administrative process. I note that Justice Grammond concluded similarly (*TELUS v. Vidéotron,* at para 37).

[86] With the added benefit of a full record now before me, it is clear that the process was intentionally designed to be confidential, and prospective bidders did not have any participatory rights in the assessment of one another's applications. The process was crafted in accordance

with the *Framework*, which involved broad public consultation in which TELUS participated extensively.

(ii) The statutory scheme empowers the Minister to prescribe the process

[87] The statutory scheme places full control over the process with the Minister, as outlined above. Prospective bidders were aware from ISED's published process that they did not have participatory rights to review or challenge their competitors' applications. Indeed, this was essential to the confidentiality and integrity of the Auction process, as demonstrated in numerous parts of the *Framework*, including paragraphs 247, 257, 422, 424 and 440.

[88] What is more, ISED clearly indicated that documentation revealing the basis for a bidder's eligibility would not be published (*Clarification Document* at Response 2.11, reproduced above at para 21). At no point did TELUS or any other bidder challenge the process the government announced, as it could have, and indeed, has done in the past (see *TELUS v Canada (Attorney General)*, 2014 FC 1, [2015] 2 FCR 3).

(iii) The importance of the Decision to TELUS was minimal

[89] TELUS, as an NMSP, was explicitly barred by the eligibility criteria from bidding on the set-aside portion of the available spectrum. TELUS' interest in the determination that Vidéotron was eligible is not akin to an applicant bidding directly against Vidéotron for set-aside spectrum or, an applicant who may have found themselves assessed as ineligible to bid for set-aside spectrum despite presenting a similar application to Vidéotron's. No such competitors brought an

application. An application previously filed by Bell Canada, another NMSP, has since been discontinued. In any event, the impact of the Decision on TELUS was certainly minimal.

[90] I am not prepared to conclude, as Vidéotron invites this Court to do and as I have addressed above - that this factor has the effect of disqualifying TELUS from applying for judicial review of the process. I accept that TELUS, as a participant in the broader Auction, has a limited procedural and financial interest in the outcome.

[91] However, given the fact that TELUS was barred from obtaining set-aside spectrum from the beginning, and that they admit their interest in the outcome to be largely economic, this factor suggests that whatever scarce expectation of procedural fairness to which TELUS is entitled as regards the set-aside eligibility determinations, is correspondingly minimal. In *Airbus Helicopters Canada Limited v. Canada (Attorney General)*, 2015 FC 257 [*Airbus*], Justice Roy held at para 116:

> Generally speaking, if one were to place the guarantees of procedural fairness along a spectrum, they would be significantly more elaborate where fundamental human rights are being adjudicated, with the other end of the spectrum being occupied by cases in which commercial interests are at play. Here, the discretion conferred on the Minister is considerable. There is no dispute on that front. The consultation that was held was by choice, with no legal obligation. There is no doubt that the Minister must act impartially and in good faith. But this was not an adjudication or a process that can be likened to the quasi-judicial function.

[92] In *Airbus*, the applicant challenged a consultation process that preceded a procurement for the purchase of helicopters, stating that the consultations conducted by government representatives were tailored to enable the winning bidder to obtain the contract and further that

the Minister had breached its legitimate expectations. The Court disagreed and found that while the applicant was entitled to expect that the procedure adopted by the Minister would be followed, this expectation was fulfilled and an informed observer would recognize the quality of the process that was put in place (*Airbus,* at paras 121-123).

[93] Accordingly, and given the present context where TELUS is a participant in the broader Auction, but not a direct competitor in the set-aside portion for which Vidéotron was assessed to be eligible, the importance of the Decision to TELUS suggests that TELUS' expectation of procedural fairness would be no greater than the one recognized in *Airbus*: at the limited end of the spectrum.

(iv) TELUS was entitled to expect that the process would be followed

[94] As with *Airbus*, and as the Parties essentially agree, TELUS' legitimate expectations as a participant in the broader Auction was limited to an expectation that ISED would follow the procedure it had publicly set out for itself.

(v) Choices of procedure: The Minister chose to require documentation describing compliance and to allow information requests and verifications

[95] Once again, while they disagree on whether Vidéotron adequately documented their set-aside eligibility application, the Parties are agreed that the Minister chose to require prospective bidders to provide relevant documentation to ISED including descriptions of the services being offered in the relevant service areas, the retail/distribution network and how subscribers accessed the services (see para 14 of these Reasons, which reproduces Decision D2 of the *Framework*).

[96] There is also no dispute among the parties that section 12.5 of the *Framework* explicitly empowered ISED to review the application forms, assess eligibility, request further information and verify the information received, all within tight timelines that were made publicly available. The bidder qualification process, including a link to the Table of Key Dates, was detailed at paragraphs 435-440 of the *Framework*.

[97] Finally, as I have noted above, the application materials, the set-aside eligibility assessment process itself, and the results, were all intentionally kept confidential. Indeed this too was explicitly indicated to the parties in Response 2.11 of the Clarification document.

(vi) Conclusion and analysis: the degree of procedural fairness owed was minimal and, having regard to the circumstances, was met

[98] Having reviewed the *Baker* factors in the context of the present application, I conclude that the degree of procedural fairness owed by the Minister to TELUS was minimal and was limited to complying with the process it had set out for itself. I also find, having regard to all of the circumstances, that the Minister complied with this duty and the procedure followed was fair and just.

(a) *The process was followed*

[99] TELUS argues that the Minister breached the duty of procedural fairness by failing to maintain adequate records of its internal decision-making. The *Framework*, and the Assessment Form, required all applicants provide documentation to ISED demonstrating their eligibility under the bidding requirements. TELUS points to an excerpt of section 12.5 of the *Framework*,

which reads: “Applicants that do not comply with ISED’s written requests will have their application to participate in the auction rejected.” TELUS contends that since the Assessment Form indicates “no” for whether documentation was submitted in respect of Fibrenoire’s retail/distribution network for the Tier 2 service areas in Western Canada, the Court should conclude that Vidéotron did not comply with ISED’s written requests and should have had their application rejected.

[100] TELUS further submits that Mr. Anderson failed to document the contents of his calls to Fibrenoire and that in any event, those calls were not a verification, as was allowed by the *Framework,* but rather an impermissible attempt to gather key information missing from the application. TELUS qualifies this as an impermissible bid repair, analogous to the procurement environment, where a clarification submitted by a bidder goes beyond the contents of the bid and provides new information.

[101] In support of its argument, TELUS cites a series of decisions from the Canadian International Trade Tribunal, as well as *Francis H.V.A.C. Services Ltd. v. Canada (Public Works and Government Services)*, 2017 FCA 165 [*Francis*], where the Federal Court of Appeal explained, at para 22:

> I agree that there is no doubt that bidders cannot make material corrections or amend their bids after the bid’s closing date. The requirements found in an RFP must be met at the time of bid closing, and a procurement entity is not entitled to consider information submitted after that date. “Bid repair”, as it has come to be known, is considered to be an indirect way of allowing a late bid. The rationale behind the rule against bid repair is easy to understand: allowing a bid to be modified or altered after the fact would undermine the bidding process itself, as it would allow a

> change to be made to a bid at a time when the bids of others are known or could be known.
>
> [Citations omitted.]

[102] While I am not in disagreement with any of the principles cited by TELUS with respect to procurement, I cannot agree that they apply to this set-aside eligibility assessment process. A final selection and award after a procurement process, and the eligibility determination for the set-aside portion of the Auction, are fundamentally different processes with distinct stakes and outcomes. A procurement that results in a binding contract, to the exclusion of other bidders, fundamentally contrasts from the Auction's bidder qualification process, and in this case, the set-aside eligibility determination.

[103] Here, there was no limit to the number of prospective bidders that could be determined eligible to bid on set-aside spectrum, so long as they met the criteria. Indeed, the stated purpose of set-aside spectrum was to increase competition. The mere submission of an application for set-aside eligibility would, if compliant, only qualify the applicant to bid, and would not guarantee the obtention of a 3500 MHz spectrum license, or give rise to a contract.

[104] In *Francis,* on the other hand, a compliant bid was due by a specific closing date and the complete and compliant bid in response to a tender could have given rise to a contract. The circumstances are clearly distinct.

[105] Furthermore, here, the *Framework* explicitly provided that additional information could be requested and verified by ISED officials during the eligibility assessment process (see paras

435 and 437 of the *Framework*). This type of iterative process was not akin to a bid repair, which is prohibited conduct within the purview of a government procurement. To the contrary, it demonstrates that, in accordance with the purpose of increasing competition, the process was intentionally designed to facilitate increased participation and to provide ISED with the flexibility required to ensure prospective bidders could correct errors, and to request or verify further information where necessary.

[106] In short, the procedures established for the eligibility assessment of the Auction - which were developed in consultation with TELUS were fundamentally different from a government procurement process.

[107] In assessing whether the stated process was complied with, I note that Vidéotron provided written documentation in support of the application with detailed explanations describing how all of the criteria for set-aside eligibility were met. As the process allowed, ISED requested further information in writing.

[108] As I have noted, the *Framework* allowed for an iterative process, where the bidder would submit information, ISED could request corrections or additional information, and could perform the requisite verifications to ensure compliance with eligibility criteria. Prospective bidders would be informed of whether they had been found eligible within the prescribed period. This iterative process, including the post-submission verifications, should come as no surprise to Auction participants: not only being spelled out in the *Framework,* at paras 435, 437, but also indicated on the set-aside eligibility form.

[109] Following ISED's written request for further information, Vidéotron complied and provided additional documentation that satisfied the departmental officials overseeing the set-aside eligibility assessment process. Mr. Anderson considered the additional information and conducted a verification of that information by placing independent anonymous phone calls. He was ultimately satisfied that Vidéotron met the requirements. He shared the Assessment Form with his supervisor, the Minister's delegate, and participated in a team meeting wherein he explained the rationale for his recommendation that Vidéotron be determined eligible. The Minister's delegate agreed with the analysis, and signed the Compiled Assessment Form.

[110] Despite TELUS' insistence on the "no" appearing on the Assessment Form, I find TELUS to be overly concerned with formality and to be elevating, in literal terms, the form above its substance. As the Respondent Iristel pointed out during the hearing, the forms to be completed are subordinate to the *Framework* itself, and are not meant to add to the requirements to be met by applicants.

[111] Particularly where, as here, a decision making process does not lend itself to the production of a single set of reasons, one has to consider not only the physical form, but the entire surrounding context in a highly administrative process (*Vavilov,* at para 137). Here, the fact that the Minister's delegate was ultimately satisfied that Vidéotron met the eligibility criteria, had the requisite explanations and documentation before him, and signed the approval, is clear from the Compiled Assessment Form.

[112] Even if the "retail and distribution network" itself was not independently documented by Vidéotron, it was abundantly described and substantiated in the initial and response documents that were provided by Vidéotron, which were independently assessed and verified by Mr. Anderson. I am not prepared to hold ISED or Vidéotron to a standard more exigent than what is explicitly set out in the *Framework* (at para 64 and Decision D2), as further discussed below in response to TELUS' challenge to the reasonableness of the Decision.

[113] In order to demonstrate that they met the eligibility criteria of actively providing commercial telecommunications services to the general public in the relevant Tier 2 service areas, Vidéotron was required to provide documentation which would include descriptions of: the services being offered in the relevant service areas; the retail and distribution network; and, how subscribers accessed the services and the numbers of subscribers in the service areas. It is clear to me from the initial and follow-up materials that were provided in addition to the Assessment Form, that Mr. Anderson, after requesting further information and conducting his independent verification, was satisfied that Vidéotron had done exactly that and was satisfied that they were set-aside eligible.

(b) *The Maintenance of adequate records*

[114] As for the maintenance of adequate records, TELUS cites the Treasury Board of Canada's *Directive on Service and Digital*, at sections 4.3.2-4.3.3 [TBS Directive], and its *Policy on Service and Digital* [TBS Policy]. The TBS Directive requires employees of the Government of Canada to document "their activities and decisions of business value" (at s. 4.3.3.1).

Paragraph 4.3.2.10 of the TBS Policy, entitled “Recordkeeping”, reads that Deputy Heads are responsible for:

> Ensuring that decisions and decision-making processes are documented to account for and support the continuity of departmental operations, permit the reconstruction of how policies and programs have evolved, support litigation readiness, and allow for independent evaluation, audit and review.

[115] Citing the TBS Directive and the TBS Policy, TELUS submits that the failure of Mr. Anderson to document the contents of his calls, and of Mr. Anderson and the Minister’s delegate to keep minutes of their meeting, were both procedurally unfair given the magnitude of the decision under review.

[116] TELUS also argues that no approvals by the Minister’s delegate appear on the Assessment Form, or on any other document produced by ISED. TELUS once again relies on *Leahy*, at paras 100, 119-121, 137, and *Kabul Farms*, at para 34, this time for the proposition that the adequate records were not kept.

[117] I disagree with both of TELUS’ contentions, namely, 1) that the Minister was required to keep more detailed records than it did, and 2) that the evidentiary record was deficient or “so thin that [the Court] cannot properly assess whether the decisions were correct or reasonable” (*Leahy,* at para 100).

[118] The Minister’s delegate’s signature and approval are documented on the Compiled Assessment Form, which also clearly indicates all the ISED employees involved in the business decision in question, along with their respective responsibilities in the process. That form lists

Mr. Anderson as the set-aside eligibility reviewer. Furthermore, the Assessment Form was completed by Mr. Anderson at the time of his work on the file, and indicates his assessment of how Vidéotron met the set-aside eligibility criteria for each of the service areas in question.

[119] I do not find - nor do the *Framework*, the TBS Directive or the TBS Policy require– that the record-keeping obligation extended to keeping recordings or detailed minutes of all internal discussions or verification processes. Given the nature of the eligibility assessment, and the compressed timelines involved, such a requirement would go well beyond what was required.

[120] In sum, I find that the Minister followed its process in assessing Vidéotron's set-aside eligibility and that the process was adequately documented, consistent with what could have been legitimately expected by the affected parties. Having regard to all of the circumstances, I find the process of assessing Vidéotron's set-aside eligibility to have been fair and just.

D. *The Decision was reasonable*

[121] A court performing a reasonableness review scrutinizes the decision in search of the hallmarks of reasonableness – justification, transparency and intelligibility – to determine whether it is justified in relation to the relevant factual and legal constraints (*Vavilov,* at para 99). Both the outcome and the reasoning process must be reasonable and the decision must be based on an internally coherent and rational chain of analysis, justified in relation to the facts and the law (*Vavilov*, at paras 83-85).

[122] TELUS argues that two aspects of the Decision fail to meet this standard.

[123] First, TELUS argues that Mr. Anderson's use of the terms "wholesaler", "OTT" and "phone" on the Assessment Form were unreasonable on account of their incoherence, ambiguity, and unintelligibility. TELUS further submits that key information was missing from the reasons, namely the phone calls that were placed, such that the Decision lacks transparency.

[124] Second, TELUS argues that Vidéotron's application was non-compliant with the *Framework's* eligibility criteria, and the Decision therefore cannot be justified in light of the factual record; the only reasonable conclusion was to reject it. Each of these two arguments contesting the Decision's reasonableness are analysed next.

(i) Transparency and intelligibility of terms used in the Decision

[125] TELUS submits that Mr. Anderson's use of the term "wholesaler" in the Assessment Form is confusing, ambiguous and unintelligible and that "reseller" would have been a more appropriate term since, as is undisputed by the parties, Fibrenoire buys access to the infrastructure of other carriers in Western Canada and then resells it to its own customers. TELUS submits that this may have confused the Minister's delegate and it is not clear he understood Vidéotron to be a reseller without its own infrastructure in the Tier 2 service areas in question. TELUS contends that on either meaning of the term wholesaler, Fibrenoire cannot reasonably be considered to actively provide commercial telecommunications services to the general public.

[126] Similarly, TELUS argues Mr. Anderson's use of the term "OTT" on the Assessment Form was ambiguous and unintelligible in the circumstances. TELUS notes that the term is

frequently used in the broadcasting context to describe a method of service delivery by a company that provides streaming content, but does own the underlying facilities or delivery network. As such, TELUS contends that one can only guess at what the Minister's delegate would interpret such a term appearing on the Assessment Form to mean, since, in TELUS' submission, it is not well-suited to describe the services provided specifically within the telecommunications industry.

[127] Finally, TELUS claims that Mr. Anderson's use of the term "Phone" was unintelligible having been written in the "comments" section of the Assessment Form, related to retail/distribution network. TELUS argues that this notation is unclear, raising multiple interpretations and making it impossible for the Court to be satisfied that an acceptable line of reasoning was employed.

[128] Accordingly, TELUS submits, Mr. Anderson either verified the retail distribution network by making phone calls – in which case he ought to have used the "verified via" box and not the "comments" box to indicate his observation – or, alternatively, he intended to indicate that the retail distribution network was marketed to Fibrenoire's Western Canada clients by phone. Either way, TELUS contends, the Court is left guessing. It cannot fill in the reasons for the decision maker. Administrative decisions – no matter how discretionary or administrative in nature – must nonetheless be not only justifiable, but also justified.

[129] An applicant in a judicial review has the burden of showing there are sufficiently serious shortcomings, consisting of central or significant flaws, to render the decision unreasonable

(*Vavilov,* at para 100). This burden cannot be met by demonstrating superficial or peripheral missteps. Reviewing Courts must also remain attentive to decision makers' demonstrated expertise; an outcome which might on its surface appear puzzling may "nevertheless [accord] with the purposes and practical realities of the relevant administrative regime and [represent] a reasonable approach given the consequences and the operational impact of the decision" (*Vavilov,* at para 93).

[130] I am unpersuaded by TELUS' arguments, which, even if they were accepted, would only amount to superficial shortcomings. Furthermore, TELUS' arguments are highly formalistic, elevating form over substance, and invite the Court to engage in a "line-by-line treasure hunt for error" instead of looking at the record holistically and paying due sensitivity to the administrative regime (*Vavilov,* at paras 102-103). Where, as here, a Decision does not lend itself to the production of a formal set of reasons, the Court must look to the record as a whole to understand the decision and uncover its rationale (*Vavilov,* at para 137).

[131] To isolate words and remove them from their broader context, is akin to cropping a person out of one background and dropping them into another. While certainly possible to do, the doctored picture depicts an altered reality from that seen by the original viewers, and interferes with the new viewer's ability to situate the person in their original surroundings – somewhat akin to removing the dots from a written page so that one cannot connect them.

[132] One cannot, in the process of judicial review, jettison the plain meaning of words and disregard the broader context in which those words belong, and instead invite the Court to

proffer an alternate view. Here, TELUS invites the Court to divorce the words used by Mr. Anderson from their ordinary meaning by removing them from their context, proffering an alternative meaning, and shedding doubt on which interpretation was adopted by the Minister's delegate. This kind of overly semantic exercise is inconsistent with the instructions in *Vavilov* in assessing reasonableness, namely that reasonableness takes its colour from the context, and that remaining sensitive to the context of every situation is how reviewing Courts can assess the legal and factual constraints that bear on the decision in question (*Vavilov,* at paras 89-90).

[133] Vidéotron's application to ISED included an explanation of how it qualified to bid on set-aside spectrum, along with details regarding Fibrenoire's role. Mr. Anderson did not simply accept that explanation. Rather, he investigated it, requested additional information, and conducted a verification to ensure they were actively providing services in the relevant Tier 2 areas. Once satisfied, he summarized his findings on the Assessment Form. That form, along with Vidéotron's application materials, was then placed before the Minister's delegate, who determined Vidéotron to be eligible.

[134] Mr. Anderson's words, like any others within one document, could certainly be cut and pasted out of their broader context, isolated, and then assigned a different meaning. However, there is no evidence to suggest that there was any doubt as to the meaning of these terms, or that either Mr. Anderson or the Minister's delegate engaged in such word-smithing.

[135] To accept TELUS' argument would require this Court to ignore the full record, including Vidéotron's application materials, which were before the Minister's delegate, in addition to Mr.

Anderson's Affidavit and subsequent testimony in cross-examination. Such an approach would also ignore Mr. Anderson and the Minister's delegate's knowledge and respective roles in the process. It would unreasonably elevate a trivial, semantic exercise, and replace the abundantly reasonable and readily apparent interpretation that the Minister's Delegate adopted. It would fail to take the entire record into account, as the reviewing Court is called to do.

[136] I am no more convinced by TELUS' argument today than my colleague Justice Grammond was for the interlocutory stay in *Telus v. Vidéotron,* at para 47, and I have the added benefit of a full and unredacted record that was unavailable to him.

[137] The nature of the services provided by Vidéotron and their retail distribution network were described in great detail in the application documents. The meaning of "wholesaler" and "OTT", read in that context, are abundantly clear to me: Fibrenoire relied on third party infrastructure to provide commercial telecommunications services to businesses in Western Canada.

[138] Indeed, it appears to have been clear to both Vidéotron and ISED, as it is to me, that as long as Fibrenoire too was a facilities-based provider registered with the CRTC, actively providing commercial telecommunications services to the general public in the relevant Tier 2 areas, the *Framework's* eligibility criteria was unconcerned with whose underlying infrastructure was being used to deliver the services.

[139] Under the circumstances, it is unrealistic for TELUS to argue that the Minister's delegate, would not have understood the intended meaning of these terms, nor is there any evidentiary basis to support the argument, particularly in light of the fact that the recommendation and the rationale were discussed prior to the final decision, and Vidéotron's documents were before the Minister's delegate at the time.

[140] The same is true of the use of the word "phone" on the Assessment Form, read in context. I read its use to indicate that the Fibrenoire's retail distribution network was accessible and delivered by phone with personal support, as described in the Vidéotron's materials submitted in support of the application. As the Respondent Iristel pointed out, given that the record shows Vidéotron's customer base in Western Canada consisted of business clientele, it makes perfect sense that their distribution network would be available by phone. Furthermore, there was no requirement for them to have a brick and mortar retail network.

[141] Even if I am mistaken, and the use of phone was intended to indicate the verification method, this minor ambiguity is entirely insufficient to render the decision unreasonable, given the other contents of the Assessment Form, the affidavit and cross-examination of Mr. Anderson, and the broader context of the process governed by the *Framework*.

[142] I conclude my remarks on transparency and intelligibility of the decision with *Vavilov's* reminder to reviewing Courts that in judicial review, written reasons given by an administrative body must not be assessed against a standard of perfection. Rather, the Court must be able to discern a reasoned explanation for the decision (see also *Alexion Pharmaceuticals Inc. v. Canada*

(Attorney General), 2021 FCA 157 at para 7). This exercise requires deference and respectful attention to the demonstrated experience and expertise of the decision maker, the practical realities of the administrative regime, and the operational impact of the decision.

[143] In light of the context, the forms, the application materials and the letters exchanged reveal a rational chain of analysis (*Vavilov*, at para. 103; *Riccio v. Canada (Attorney General)*, 2021 FCA 108 at para 22). The meaning ascribed to the words "phone", "wholesale" and "OTT" by Mr. Anderson, read in context, were notations to reflect the due diligence he conducted in assessing Vidéotron's compliance with the eligibility criteria. The Decision that followed, considered in context, is transparent and intelligible.

(ii) The record is adequately documented

[144] TELUS further submits, as with their procedural fairness arguments above, that the lack of records of Mr. Anderson's phone calls and of his meeting with the Minister's delegate where he explained the rationale for his recommendation, makes it impossible for the Court to perform its role of scrutinizing the decision, and is thus unreasonable.

[145] For the same reasons as above, I disagree. Having regard to the context, the record, the confidentiality and tight timelines inherent to the process, along with the guiding *Framework* and Clarification Document, there was no requirement for ISED to keep more detailed records than it did. It acted reasonably in this regard.

(iii) Incorrect customer statistics did not impact the reasonableness of the Decision

[146] TELUS also notes that when Vidéotron responded to the Minister's written request, it disclosed and corrected some cases of over-reporting of the numbers of its customers in Western Canada, as a result of double counting. TELUS further notes that the Assessment Form reflects the numbers originally given to ISED, rather than the corrected numbers disclosed by Vidéotron in its response. TELUS submits that the Minister's delegate thus had incorrect factual information before him when he made the Decision, with an inflated customer count for Western Canada. This, according to TELUS, is a significant error since the numbers of customers would have directly informed the question of whether Vidéotron was actively providing services to the general public.

[147] I have reviewed the figures appearing on both the Assessment Form and those provided in the corrected lists by Vidéotron. I find the difference in the number of customers in each of the service areas to be insubstantial. Given that there was no minimum threshold requirement of customers required to meet the set-aside eligibility criteria, there is no reason to believe the minor differences in the figures would have impacted the decision.

[148] Even if I were convinced that the Minister's delegate was not aware of the correction – which I am not – the difference is certainly not a sufficiently serious shortcoming to render the decision unreasonable. As noted above, Vidéotron's written documentation, including the correction disclosed in Vidéotron's response, was before the Minister's delegate when the decision was made. The fact that the Assessment Form was not updated following Vidéotron's response to ISED's written request does not automatically mean the corrected information was unknown to the Minister's delegate.

[149] Either way, the minor differences in the numbers of customers reported for each of the three provinces in Western Canada are immaterial, and do not have the effect of rendering the Decision unreasonable.

(iv) The Decision is justified in light of the facts and the law

[150] TELUS' final ground for challenging the reasonableness of the Minister's decision, namely that it is not justified in light of the facts and eligibility criteria, goes to the heart of its rationale in bringing this application. Specifically, TELUS appears to be in irreconcilable disagreement with ISED's application of the set-aside eligibility criteria.

[151] Some aspects of this argument incorporate elements of others I have already disposed of earlier in these Reasons, namely: (i) the appropriateness of the contents of Mr. Anderson's Affidavit to provide helpful background evidence (in paras 68-77); and, (ii) ISED's compliance with the procedural requirements of the *Framework*, including Mr. Anderson's verification calls (in paras 98-112).

[152] TELUS first submits that even if the verification calls were allowed, it was irrational to rely on them to conclude that services actually were being actively provided to the general public, without taking further steps to verify Fibrenoire's claim that it could provide internet services. TELUS submits that the fact that Vidéotron's capacity to offer telecommunications services in Western Canada was conditional on finding a business partner with the infrastructure to provide the service, was tantamount to it not meeting the eligibility criteria. By deciding otherwise, in TELUS' submission, ISED impermissibly departed from the *Framework*.

[153] TELUS further submits that ISED failed to apply the eligibility criteria in a reasonable manner, making it unreasonable to conclude that Vidéotron had met them. According to TELUS, Vidéotron could not reasonably be considered 1) to be actively providing commercial telecommunications services in Western Canada, because of its lack of infrastructure and distribution network, or 2) providing those services to the general public, because of its low customer base there.

[154] TELUS' argument takes as its premise that to actively provide service to the general public in the relevant Tier 2 service area, it is not sufficient to be registered as a facilities-based provider with CRTC. Instead, the *Framework* must be read to mean that the facilities-based provider must be providing services in each of those service areas using its own facilities-based physical infrastructure. Further, TELUS submits that the numbers of customers served by Vidéotron in Western Canada was insufficient to meet the criteria of providing services to the general public, in spite of the absence of any minimum threshold requirement in the *Framework*.

[155] TELUS is, of course, free to provide its own suggested interpretation of how the eligibility criteria should be applied and of the underlying intentions and ministerial policy goals that formed the backdrop to the *Framework* that was ultimately adopted. Indeed, it relies heavily on the prior work experience of its affiant, Mr. Mulvihill, a former ISED employee, in doing so.

[156] Be that as it may, it is not for TELUS to draft and apply its own criteria, which do not appear in the *Framework* governing the process, or to apply its own measuring stick to how the criteria that do appear in the *Framework* ought to have best been interpreted and applied (*Delios*,

at para 28). It is not enough to put forward an alternative interpretation when the one adopted by the decision-maker is compatible with the text and context (*McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at paras 40-41).

[157] It is clear to me, as it was to the Minister, that both Vidéotron and Fibrenoire were registered with the CRTC as facilities-based providers, neither being an NMSP, and that Fibrenoire was actively providing commercial telecommunications services to the general public in each of the three Tier 2 service areas in question. Given that these three set-aside criteria were met, the determination that Vidéotron was eligible to bid on set-aside spectrum in those provinces was eminently reasonable, and entirely open to the Minister, in the circumstances.

[158] Nowhere in the *Framework* or elsewhere was it stated, as TELUS now argues, that to be eligible to bid for set-aside spectrum, the telecommunications services had to be offered by the prospective bidder using their own transmission facilities located in the relevant service areas. Rather, the *Framework* only required that the prospective bidder be registered with the CRTC as a facilities-based provider. ISED's interpretation, from this perspective, holds up under the plain language of the eligibility requirements. TELUS' alternative interpretation cannot reasonably be implied by the *Framework*.

[159] It is also not clear to me how such an interpretation of the eligibility requirements could have been assessed in the applicable timelines. This would require the assessor, for every application, to consider not only whether the applicant was a facilities-based provider registered with the CRTC, but whether it was serving its customers in each of those service areas using its

own transmission facilities. I am not prepared to adopt that this was the underlying intention of the *Framework*, and that such a requirement can be read into the eligibility criteria, or practically assessed or verified in the applicable timelines. There is simply no justification to distort the language of the criteria in the way TELUS suggests.

[160] Furthermore, there was no minimum threshold to meet for the numbers of customers served. Fibrenoire's distribution network was accessible by phone. Its services were customized to the needs of its existing business clientele, and available to new customers. Regardless of what TELUS may submit regarding the size of the customer base, where their home offices were located, or whose underlying infrastructure Fibrenoire relied on to deliver its services, Fibrenoire served an appreciable number of customers in each of the Tier 2 service areas in question.

[161] Indeed, to hold otherwise would not have borne the hallmarks of reasonableness – transparency, intelligibility, justification – it would be inconsistent with the flexible rules on telecommunications services being provided somewhere in the larger Tier 2 service areas and the absence of a minimum customer threshold. Such an interpretation would have also undermined the clear objectives of increasing competition.

[162] I note that this judicial review is not the first time that TELUS has opposed a pro-competitive interpretation or application of the eligibility criteria. Indeed, the *Framework*, at para 49, highlights TELUS's opposition to them during the consultation. It also notes that TELUS was opposed to set-aside-eligible bidders being allowed to bid on open spectrum and getting priority to non-encumbered spectrum (at paras 49 and 87). Despite noting these objections, the

Minister decided to proceed largely as initially proposed with respect to the set-aside auction, framed by the objective of increased competition.

[163] In short, TELUS's opposition to the set-aside eligibility criteria, in favour of another model, were neither ignored nor unreasonably overlooked. Rather, the Minister clearly decided to reject them in favour of the eligibility criteria that were adopted, and which I have found were reasonably applied in their entirety to Vidéotron's application.

[164] Ultimately, TELUS has not provided a basis for the Court to intervene. Rather, it prefers a far more restrictive interpretation to meet the set-aside eligibility criteria. However, the Minister's delegate here chose an interpretation that added up, being both justified and justifiable in light of the *Framework*. The Decision was thus entirely reasonable not only in light of the plain language of the eligibility requirements found in the *Framework*, but also in light of the record that was before the Decision-maker. Read holistically, the Decision supports a rational application of the criteria, using the yardstick that the Decision-maker was handed, and applied.

IV. Costs

[165] At the Court's request, the parties provided their submissions on costs at the hearing.

[166] Vidéotron argued that costs should be ordered in the highest column (V) of Tariff B of the *Federal Courts Rules*, SOR/98-106, on the basis that TELUS should never have brought the challenge in the first place, and at minimum, like Bell, should have discontinued its application after the interlocutory decision in *Telus v. Vidéotron*. Vidéotron urged that a message should be

sent to the Applicant that the Court should not be used as a weapon in the conduct of commercial warfare.

[167] The AGC requested costs as well, arguing that it should be entitled to them as an Intervener, citing *Sawridge Band v. Canada*, 2006 FC 656 [*Sawridge*] and *Glaxo Canada Inc. v. Canada (Minister of National Health & Welfare)*, 1988 CarswellNat 566, 19 CIPR. 120, aff'd [1990] 107 NR 195. It requested a lump sum of $10,000, on the basis that while an average matter of this scope would merit about $5,000 in costs, it had to participate in the application hearing as well as the previous motion for injunctive relief, in addition to gathering a significant amount of evidence.

[168] Iristel also requested costs, although it did not specify the amount requested.

[169] The Applicant opposed any call for elevated costs, contending that the default middle column (III) of Tariff B should apply regardless of the successful party, given that the application addresses an important issue, namely whether a federal body properly carried out its function. They also noted that counsel have been working collegially. TELUS noted that the interim motion dealt with costs, which were not in the cause, and thus should not have any bearing.

[170] Taking these diverging positions on costs into consideration, and given that the parties did not present any bills of costs, and the Intervener requested lump sum costs, I will order that

Costs be assessed under the fourth Column of Tariff B. This is not due to any lack of civility amongst the parties that I witnessed, or to sanction any inappropriate behaviour.

[171] Rather, the increased costs beyond the default column (III), are merited given the significant amount of work and stakes involved in this litigation, including: the lengthy process of agreeing to and preparing the evidentiary record; the records from three primary parties totalling nearly 5000 pages, not including their books of authorities; and, the numbers of counsel involved in the litigation, six of whom made oral submissions to the Court. As in *Ludco Enterprises Ltd. v. Canada*, 2002 FCA 450 at para 9, these figures illustrate the volume of work generated by the importance and complexity of the issues.

[172] Finally, costs to the intervener are warranted in this case. I find, consistent with *Sawridge*, at paras 39-45, that while interveners are not generally entitled to costs, in this case, the AGC had a particular interest, and indeed contributed to the Court's deliberations significantly. The AGC did so by leading evidence of the broader legislative framework generally, and, more importantly, the specific procedural backdrop to the development of the *Framework* for the Auction and the set-aside eligibility assessment process in particular. This viewpoint would not otherwise have been available.

V. Conclusion

[173] In light of the reasons provided above, the application for judicial review is dismissed, with costs payable by the Applicant to the two Respondents and the Intervener, to be assessed under Column IV of Tariff B.

JUDGMENT in T-1335-21

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is dismissed.

2. Costs are payable by the Applicant to the Respondents, Vidéotron and Iristel, and Intervener, the Attorney General of Canada, each to be assessed under Column IV of Tariff B.

"Alan S. Diner"
Judge

ANNEX A: Relevant Legislative Provisions

Telecommunications Act, SC 1993, c 38
Loi sur les télécommunications (L.C. 1993, ch. 38)

Canadian Telecommunications Policy

7 It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives

(a) to facilitate the orderly development throughout Canada of a telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;

(b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;

(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;

(d) to promote the ownership and control of Canadian carriers by Canadians;

(e) to promote the use of Canadian transmission facilities for telecommunications within Canada and between Canada and points outside Canada;

(f) to foster increased reliance on market forces for the provision of telecommunications services and to ensure

Politique canadienne de télécommunication

7 La présente loi affirme le caractère essentiel des télécommunications pour l'identité et la souveraineté canadiennes; la politique canadienne de télécommunication vise à :

a) favoriser le développement ordonné des télécommunications partout au Canada en un système qui contribue à sauvegarder, enrichir et renforcer la structure sociale et économique du Canada et de ses régions;

b) permettre l'accès aux Canadiens dans toutes les régions — rurales ou urbaines — du Canada à des services de télécommunication sûrs, abordables et de qualité;

c) accroître l'efficacité et la compétitivité, sur les plans national et international, des télécommunications canadiennes;

d) promouvoir l'accession à la propriété des entreprises canadiennes, et à leur contrôle, par des Canadiens;

e) promouvoir l'utilisation d'installations de transmission canadiennes pour les télécommunications à l'intérieur du Canada et à destination ou en provenance de l'étranger;

f) favoriser le libre jeu du marché en ce qui concerne la fourniture de services de télécommunication et assurer l'efficacité

that regulation, where required, is efficient and effective;

(g) to stimulate research and development in Canada in the field of telecommunications and to encourage innovation in the provision of telecommunications services;

(h) to respond to the economic and social requirements of users of telecommunications services; and

(i) to contribute to the protection of the privacy of persons.

de la réglementation, dans le cas où celle-ci est nécessaire;

g) stimuler la recherche et le développement au Canada dans le domaine des télécommunications ainsi que l'innovation en ce qui touche la fourniture de services dans ce domaine;

h) satisfaire les exigences économiques et sociales des usagers des services de télécommunication;

i) contribuer à la protection de la vie privée des personnes.

***Radiocommunication Act*, RSC 1985, c R-2**
***Loi sur la radiocommunication* (L.R.C. (1985), ch. R-2)**

Minister's Powers

5 (1) Subject to any regulations made under section 6, the Minister may, taking into account all matters that the Minister considers relevant for ensuring the orderly establishment or modification of radio stations and the orderly development and efficient operation of radiocommunication in Canada,

(a) issue

(i) radio licences in respect of radio apparatus,

(i.1) spectrum licences in respect of the utilization of specified radio frequencies within a defined geographic area,

Pouvoirs ministériels

5 (1) Sous réserve de tout règlement pris en application de l'article 6, le ministre peut, compte tenu des questions qu'il juge pertinentes afin d'assurer la constitution ou les modifications ordonnées de stations de radiocommunication ainsi que le développement ordonné et l'exploitation efficace de la radiocommunication au Canada :

a) délivrer et assortir de conditions :

(i) les licences radio à l'égard d'appareils radio, et notamment prévoir les conditions spécifiques relatives aux services pouvant être fournis par leur titulaire,

(i.1) les licences de spectre à l'égard de l'utilisation de fréquences de radiocommunication définies dans une zone géographique déterminée, et notamment prévoir les conditions spécifiques relatives aux services pouvant être fournis par leur titulaire,

(ii) broadcasting certificates in respect of radio apparatus that form part of a broadcasting undertaking,

(ii) les certificats de radiodiffusion à l'égard de tels appareils, dans la mesure où ceux-ci font partie d'une entreprise de radiodiffusion,

(iii) radio operator certificates,

(iii) les certificats d'opérateur radio,

(iv) technical acceptance certificates in respect of radio apparatus, interference-causing equipment and radio-sensitive equipment, and

(iv) les certificats d'approbation technique à l'égard d'appareils radio, de matériel brouilleur ou de matériel radiosensible,

(v) any other authorization relating to radiocommunication that the Minister considers appropriate,

(v) toute autre autorisation relative à la radiocommunication qu'il estime indiquée;

and may fix the terms and conditions of any such licence, certificate or authorization including, in the case of a radio licence and a spectrum licence, terms and conditions as to the services that may be provided by the holder thereof;

(b) amend the terms and conditions of any licence, certificate or authorization issued under paragraph (a);

b) modifier les conditions de toute licence ou autorisation ou de tout certificat ainsi délivrés;

(c) make available to the public any information set out in radio licences or broadcasting certificates;

c) mettre à la disposition du public tout renseignement indiqué dans les licences radio ou les certificats de radiodiffusion;

(d) establish technical requirements and technical standards in relation to

d) fixer les exigences et les normes techniques à l'égard d'appareils radio, de matériel brouilleur et de matériel radiosensible, ou de toute catégorie de ceux-ci;

(i) radio apparatus,

(ii) interference-causing equipment, and

(iii) radio-sensitive equipment,

or any class thereof;

(e) plan the allocation and use of the spectrum;

e) planifier l'attribution et l'utilisation du spectre;

(f) approve each site on which radio apparatus, including antenna systems, may be located, and approve the erection of all masts, towers and other antenna-supporting structures;

f) approuver l'emplacement d'appareils radio, y compris de systèmes d'antennes, ainsi que la construction de pylônes, tours et autres structures porteuses d'antennes;

(g) test radio apparatus for compliance with technical standards established under this Act;

g) procéder à l'essai d'appareils radio pour s'assurer de leur conformité aux normes techniques fixées sous le régime de la présente loi;

(h) require holders of, and applicants for, radio authorizations to disclose to the Minister such information as the Minister considers appropriate respecting the present and proposed use of the radio apparatus in question and the cost of installing or maintaining it;

h) exiger que les demandeurs et les titulaires d'autorisations de radiocommunication lui communiquent tout renseignement qu'il estime indiqué concernant l'utilisation — présente et future — de l'appareil radio, ainsi que son coût d'installation et d'entretien;

(i) require holders of radio authorizations to inform the Minister of any material changes in information disclosed pursuant to paragraph (h);

i) exiger que ces titulaires l'informent de toute modification importante des renseignements ainsi communiqués;

(j) appoint inspectors for the purposes of this Act;

j) nommer les inspecteurs pour l'application de la présente loi;

(k) take such action as may be necessary to secure, by international regulation or otherwise, the rights of Her Majesty in right of Canada in telecommunication matters, and consult the Canadian Radio-television and Telecommunications Commission with respect to any matter that the Minister deems appropriate;

k) prendre les mesures nécessaires pour assurer, notamment par voie de réglementation internationale, les droits de Sa Majesté du chef du Canada en matière de télécommunications et consulter le Conseil de la radiodiffusion et des télécommunications canadiennes sur les questions qui lui semblent indiquées;

(l) make determinations as to the existence of harmful interference and issue orders to persons in possession or control of radio apparatus, interference-causing equipment or radio-sensitive equipment that the Minister determines to be responsible for the harmful interference to cease or

l) décider de l'existence de tout brouillage préjudiciable et donner l'ordre aux personnes qui possèdent ou contrôlent tout appareil radio, matériel brouilleur ou matériel radiosensible qu'il juge responsable du brouillage de cesser ou de modifier l'exploitation de cet appareil ou

modify operation of the apparatus or equipment until such time as it can be operated without causing or being affected by harmful interference;	de ce matériel jusqu'à ce qu'il puisse fonctionner sans causer de brouillage préjudiciable ou sans en être contrarié;
(m) undertake, sponsor, promote or assist in research relating to radiocommunication, including the technical aspects of broadcasting; and	**m)** entreprendre, parrainer, promouvoir ou aider la recherche en matière de radiocommunication, notamment en ce qui touche les aspects techniques de la radiodiffusion;
(n) do any other thing necessary for the effective administration of this Act.	**n)** prendre toute autre mesure propre à favoriser l'application efficace de la présente loi.
…	…
(1.4) The Minister may establish procedures, standards and conditions, including, without limiting the generality of the foregoing, bidding mechanisms, minimum bids, bidders' qualifications, acceptance of bids, application fees for bidders, deposit requirements, withdrawal penalties and payment schedules, applicable in respect of a system of competitive bidding used under subsection (1.2) in selecting the person to whom a radio authorization will be issued.	**(1.4)** Le ministre peut établir les formalités, les normes et les modalités applicables au processus d'adjudication visé au paragraphe (1.2) et notamment fixer les mécanismes d'enchère, la mise à prix, les qualités des enchérisseurs, les modalités d'acceptation des enchères, les frais de demande exigibles des enchérisseurs, les exigences de dépôt, les pénalités pour retrait et les calendriers de paiement.

ANNEX B: *Policy Framework*

36. A wide range of service providers, including NMSPs, regional service providers, and wireless Internet service providers (WISPs), have expressed demand for sufficient 3500 MHz spectrum to provide 5G services to Canadians. The release of this band presents a key opportunity to support the ability of Canada's telecommunications service providers to offer 5G services to consumers, the ability of regional service providers to compete with the NMSPs in the provision of 5G services, and the ability of WISPs to offer fixed wireless services in rural and remote areas of the country.

37. However, without pro-competitive measures it is unlikely that the 3500 MHz auction would support ISED's policy objectives. Notably, there is a risk that competition in the 5G mobile wireless market could suffer if regional service providers do not acquire sufficient spectrum. In their recent submission to the Canadian Radio-television and Telecommunications Commission's (CRTC) review of mobile wireless services in 2019, the Competition Bureau found that the NMSPs possess retail market power, indicated by high concentration, high profitability, and high barriers to entry. The Competition Bureau also found that in areas where the NMSPs face a facilities-based regional service provider, prices are significantly lower. The Bureau reported that generally, prices are 35-40% lower in areas where facilities-based regional service providers have achieved a market share above 5.5%.

38. The use of spectrum set-asides has contributed to the growth of regional service providers and their competitiveness in the market as they continue to invest in their mobile wireless networks and grow their subscribership. A set-aside is likely to provide the increased opportunity for regional service providers to acquire sufficient spectrum to compete effectively against the NMSPs in the market for 5G services. In particular, access to spectrum in urban areas would promote the delivery of comparable services from these regional service providers and increase the level of competition in the market.

39. WISPs provide fixed broadband services to rural and remote areas that are generally underserved compared to urban regions, with slower broadband speeds and less choice. Many WISPs have noted that access to spectrum continues to be a barrier for service providers in these areas.

40. Accordingly, it is critical that both regional service providers and WISPs have the opportunity to acquire 3500 MHz spectrum given it is one of the key bands where 5G technologies are likely to be deployed. ISED is of the view that without the use of pro-competitive measures, NMSPs have the incentive and means to acquire all the spectrum available at auction, significantly hindering competition from regional service providers and WISPs.

41. Spectrum set-asides used in previous auctions reserved between 40-60% of the available spectrum for eligible bidders. In the Consultation for the 3500 MHz auction, many stakeholders identified 50 to 100 MHz of mid-band spectrum as necessary to provide high-quality 5G services. However, there is only a total of 200 MHz in the 3500 MHz band, much of which is currently licensed. Due to the high demand for this band and the need to balance access to spectrum for many different service providers, ISED is of the view that a set-aside of 50 MHz,

accounting for essentially 25% of the total band, will provide the best opportunity to achieve the policy objectives for the 3500 MHz auction and will be implemented.

42. In addition to a set-aside, ISED also consulted on the use of a spectrum cap for the 3500 MHz auction. While spectrum caps have been used in past auctions to prevent excessive spectrum concentration, the application of a cap in the 3500 MHz auction – as a standalone measure or combined with a set-aside – would not support ISED's policy objectives. Due to the existing holdings of existing licensees and the bidding power of the NMSPs, a spectrum cap would be ineffective in facilitating access for regional providers and WISPs in many tiers. This would have negative consequences for competition in the mobile wireless market, as well as the delivery of high-speed broadband in rural and remote regions.

43. While a set-aside is necessary to promote access to spectrum for smaller service providers, ISED recognizes that there are tiers where less than 50 MHz of spectrum is available for auction. In many of these tiers, WISPs have existing holdings that reduce the amount of spectrum available for auction. Therefore, where there is less than 50 MHz of spectrum available for auction, in tiers that do not contain a large (urban) population centre, ISED will not implement a set-aside.

44. On the other hand, it is noted that it is particularly critical that regional service providers have the opportunity to acquire enough spectrum to meaningfully offer 5G services and compete with NMSPs in highly populated areas. Recognizing the importance of each type of service provider and regional differences across the country, ISED will implement a set-aside in all Tier 4 service areas with a large population centre. In those service areas with less than 50 MHz available, all spectrum will be set-aside. This will enable the launch of high-quality 5G services, foster competition in the market, and promote access to spectrum in rural and remote areas.

…

6.1 Eligibility for set-aside spectrum

47. In the Consultation, ISED sought comments on the proposal that eligibility to bid on set-aside spectrum be limited to bidders registered with the CRTC as facilities-based providers that are not NMSPs, and that are actively providing commercial telecommunication services to the general public in the relevant Tier 2 service area of interest, effective as of the date of application to participate in the 3500 MHz auction.

Summary of comments

48. Bell suggested that the proposed criteria were overly broad and they should be narrowed to only include providers who are registered with the CRTC as mobile wireless carriers or can demonstrate that they have deployed a fixed wireless network, and are actively providing commercial wireless services in the relevant Tier 4 area. Specifically, it added that the provision of satellite relay distribution and direct-to-home services should not qualify bidders as set-aside-eligible. Other stakeholders including Cogeco, Iristel and Québecor also raised similar concerns and suggested that providers of satellite relay distribution and direct-to-home services should not qualify as set-aside-eligible bidders. Xplornet agreed with other parties that broadcast services should not count towards meeting the eligibility criteria.

49. Rogers proposed set-aside-eligible bidders should be restricted to bidding only on set- aside spectrum in all service areas to increase auction fairness and competition within set-aside spectrum. Similarly, TELUS suggested that set-aside-eligible bidders be prohibited from bidding on open spectrum. It also strongly opposed the proposed eligibility criteria, including the restriction on NMSPs and the limitation to active Tier 2 service areas.

50. Cogeco and Québecor proposed that eligibility for set-aside spectrum be based on actively providing services in the Tier 4 area. Xplornet proposed that providers should have been actively providing services in the relevant Tier 4 area as of June 5, 2019, to be set-aside-eligible.

51. Eastlink proposed that the definition of set-aside-eligible bidders should include the provision of mobile or fixed wireless telecommunications services.

52. Ecotel proposed that eligibility for set-aside spectrum should not be restricted to offering services in the relevant Tier 2 area, nor should offering commercial telecommunications services be limited to the general public, but should also include industries, vertical markets, private networks, Internet of Things and others.

53. Shaw proposed that providers be required to present proof that they are actively offering commercial mobile wireless services in Canada using a radio access network that it owns and operates in the relevant Tier 4 area.

54. BCBA proposed that set-aside eligibility should be different for non-urban areas, with the set-aside only available to companies with less than $25 million in annual revenues. BCBA also proposed that operators serving a Tier 4 area adjacent to a provincial border be allowed to bid on adjacent Tier 4 areas in the neighbouring province.

55. CanWISP proposed that regional mobile service providers be restricted from accessing set-aside spectrum.

56. Kris Joseph and Michael McNally proposed that the Tier 2 requirement should be limited to urban contexts or eliminated.

57. SaskTel, TekSavvy and EOWC/EORN agreed with the proposed criteria.

Discussion

58. ISED has identified three primary issues raised by stakeholders concerning the eligibility criteria for set-aside spectrum licences:

• defining “commercial telecommunications services”

• defining “general public”

• identifying the tier at which providers must be actively providing services to be set-aside-eligible

59. To promote optimal spectrum utilization and deployment, set-aside-eligible bidders must be actively providing commercial telecommunications services. Services that are regulated under the *Broadcasting Act* will not be considered as "commercial telecommunications services" for the purposes of set-aside eligibility, however all services that are regulated under the *Telecommunications Act* may qualify.

60. The definition of "general public" was raised as a potential issue concerning service

providers that offer their services to industries, vertical markets, private networks, and other "non-traditional" consumers. For the purposes of this decision, "general public" can include businesses, enterprises and institutions, as well as "traditional" residential consumers. Therefore, providers who are actively offering commercial telecommunications services to any of these consumers will be considered set-aside-eligible as long as they meet the additional eligibility criteria.61. ISED is of the view that allowing set-aside-eligible bidders to bid on spectrum in any Tier 4 service area within the relevant Tier 2 service area for which they are currently offering services would facilitate the expansion of smaller providers' networks, including to rural areas.

62. Therefore, eligibility to bid on set-aside spectrum will be limited to those registered with the CRTC as facilities-based providers, that are not National Mobile Service Providers, and that are actively providing commercial telecommunications services to the general public in the ***relevant*** Tier 2 area of interest, effective as of the date of application to participate in the 3500 MHz auction. Services that are regulated under the *Broadcasting Act* will not be considered as "commercial telecommunications services" for the purposes of set-aside eligibility, however all services that are regulated under the *Telecommunications Act* may qualify. *National Mobile Service Providers* will be defined as "companies with 10% or more of national wireless subscriber market share." The determination of subscriber market share will be based on the 2019 *CRTC Communications Monitoring Report* and related open data.

63. Eligible entities are referred to as set-aside-eligible bidders. Upon application to participate in the auction, applicants will be required to indicate in their application whether they are applying to bid as a set-aside-eligible bidder on a Tier 2 service area by service area basis.

64. In its assessment of a bidder's eligibility to bid on the set-aside spectrum, ISED will determine whether commercial telecommunications services are actively being provided to the general public in the service area by the potential bidder. Potential bidders will be required to demonstrate this by providing relevant documentation to ISED, which will include, but not be limited to, descriptions of:

- the services being offered in the service area;
- the retail/distribution network; and
- how subscribers access services and the number of subscribers in the service area.

Decision D2

Eligibility to bid on set-aside spectrum will be limited to those registered with the CRTC as facilities-based providers that are not national mobile service providers, and that are

actively providing commercial telecommunications services to the general public in the relevant Tier 2 service area of interest, effective as of the date of application to participate in the 3500 MHz auction. Services that are regulated under the Broadcasting Act will not be considered as "commercial telecommunications services" for the purposes of set-aside eligibility, however all services that are regulated under the Telecommunications Act may qualify.…

247. ISED has implemented robust measures to assess and qualify prospective bidders upon application to participate in an auction. These measures serve to prevent the potential for NMSPs acquiring set-aside spectrum through a set-aside-eligible entity. As with previous auctions, ISED is requiring information relating to the business structure of each bidder. Further, in the 600 MHz auction, ISED introduced an attestation in the application process that it will maintain in the 3500 MHz auction to safeguard the integrity of the auction. Providers will need to disclose any explicit or implicit arrangements or agreements where financing, security or guarantees have been, or may be, provided to the applicant or any of its affiliates, by another applicant or its affiliates, relating to the acquisition or use of any spectrum licences being auctioned. If an applicant is involved in an arrangement or agreement, ISED will request a brief description explaining the nature of their agreement or arrangement. ISED is unaware of any such existing agreements and is of the view that such a scenario is unlikely. However, it will request this information in order to further safeguard the integrity of the auction.

…

257. Upon receipt of this material, ISED will either make a ruling based on the materials submitted or ask the applicant for further information (and provide a timeline within which to do so).

…

422. ISED will publish a list of all applicants, but in order to maintain the anonymity of the auction and to discourage anti-competitive behaviour, ISED will not publish the list of the set-aside-eligible bidders, the amount of the pre-auction deposits or the number of eligibility points that each bidder has at the beginning of the auction.

…

424. For this licensing process, in an effort to streamline the submission of the application forms and associated documents, ISED will use Canada Post's epost Connect service as it has for the most recent auctions. The epost Connect service is a way for business and government to securely send confidential digital messages and documents over the Internet with bank-grade encryption. The service is certified to transmit documents up to the Protected B classification level. Canada Post certifies that all data sent through their service stays within Canada, on Canadian servers.

…

12.5 Bidder qualification

435. ISED will review the application forms, any associated documents, and the accompanying financial deposit after the closing date for the submission of applications. In this initial review, ISED will identify any errors in the application forms or financial deposit. It will also determine whether any additional information related to any affiliate or associated entity of the applicant is required. For applicants applying to be set-aside-eligible, ISED will also assess the eligibility to obtain set-aside licences in the Tier 4 areas, based on the relevant Tier 2 service areas of interest, and may request further information and/or verify the information.

436. Applications that are received without the appropriate deposit by the application deadline will be rejected.

437. Following the initial review period, ISED will provide applicants with an opportunity to correct any errors or inconsistencies in their application and will request any additional information related to affiliated or associated entities if required. A copy of the original applications may be returned to the applicant with a brief statement outlining any discrepancies and/or omissions or requesting additional information. The applicant will be invited, in writing, to resubmit the corrected form and/or the additional information, by the date specified in the written statement.

438. Applicants that do not comply with ISED's written requests will have their application to participate in the auction rejected. Applications that are rejected, including those for which an opportunity has been provided to correct errors or inconsistencies identified by ISED but that are still found to be deficient, may be returned to the applicant outlining the deficiencies, along with the applicant's deposit.

439. Applicants that have submitted acceptable application materials, including the accompanying total pre-auction deposit, will be informed that they have qualified to participate in the auction. Qualified bidders will receive additional information related to their participation in the auction through separate mail-outs at a later date. This information may include, among other items, a bidder information document, a user manual and the schedule for the information session and mock auctions.

440. A list of all qualified bidders, along with information related to their beneficial ownership, affiliates and associated entities, will be made public via ISED's website in accordance with the timelines stated in the Table of Key Dates. The number of eligibility points and the financial deposit amounts will not be published prior to the auction as the information could provide an indication of bidding intentions. Sharing any of this information is strictly prohibited in accordance with the anti-collusion rules outlined in section 9.4.

ANNEX C: *Impugned paragraphs of Anderson Affidavit*

59. I began my review of Vidéotron's Application form the day after the application deadline, namely April 7, 2021. I would therefore have entered the initial information from its application directly onto the Assessment Form. The practice of our team was to use the forms and enter information from our work on the assessments as we were doing so. We did not keep additional files or written notes related to specific assessments. At times during the process, I might confer on substantive issues related to the assessments with another team member working in the auction room or by land-line telephone to the other secure auction room at 3701 Carling Avenue in Ottawa (the Communications Research Centre campus) but we would then follow up on that point directly by, for instance, entering information in the assessment form or communicating with an applicant. We did not produce any transitory follow up internal e-mails or paper notes.

60. For example, when I was reviewing the set-aside portion of Vidéotron's 3500 MHz Auction application, I wanted to verify the information it had provided about Fibrenoire's services in Western Canada, including its retail and distribution network, and was unable to do so from its website. I had a conversation with Ms. Macartney about this on April 9, 2021, and she sent a letter to Vidéotron through the secure e-post requesting further details. I attach a copy of that letter as Exhibit R.

61. Asking for additional information in order to verify material in applications was a standard part of the 3500 MHz Auction application review process and was specifically referred to in the Framework and on Form 4 of the application form. I had asked for further information to verify a number of other applicants in the 3500 MHz Auction and I was aware that I and my colleagues had verified information regarding services being provided, lists of affiliates and associates, letters of credit and other information in past auctions.

62. Vidéotron sent additional information on April 12, 2021, which I attach as Exhibit S. This included a more detailed description of the means by which Fibrenoire provided service in Western Canada, and a list of customers thereto.

63. In order to further verify that Fibrenoire was actively providing business telecommunication services to the public in these areas, I posed as a potential customer. I called the number listed on Fibrenoire's website for new customers, using a blocked number, on two occasions during the week of April 12, 2021. During the first call I made, I posed as a potential business client with offices in Vancouver and Calgary and asked if Fibrenoire would be able to provide services. The response was yes, it could offer internet services, but that it would not be through Fibrenoire's own infrastructure as Fibrenoire's services used third-party infrastructure. I ended the call before I was able to get exact pricing details, as I was unable to provide exact details for my non-existent business. The next day, I conducted the same exercise, but posed this time as a potential client with offices in Winnipeg and Thunder Bay. Again, Fibrenoire indicated that it could offer internet services in those locations, but the service would be through third-party infrastructure.

…

65. I completed the Assessment Form, with an indication that Vidéotron was eligible in Western Canada Tier 2 areas. In those areas I entered the following notes on the Assessment Form for

each of the Western Tier 2 areas “Provides OTT services to businesses through affiliate Fibrenoire.” In the Summary Assessment Table at the end of the Assessment Form I entered: “Provides internet service to business through Fibrenoire as wholesaler.” This was intended to characterize the information obtained from Vidéotron/Fibrenoire during my verification exercise, namely that it was actively providing service in these areas using third-party infrastructure.

…

68. On April 19, 2021, our team met in order to discuss the different components of various 3500 MHz Auction applications that were being reviewed. I briefly explained evidence received by Vidéotron and the result of the additional verification I conducted which formed the rationale for my recommendation with respect to Vidéotron with Mr. Kellison at that time. Mr. Kellison indicated that he agreed that Vidéotron met the test for set-aside eligibility in each area in which it had applied. We also discussed the other applications at that meeting.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1335-21
STYLE OF CAUSE:	TELUS COMMUNICATIONS INC. v VIDÉOTRON LTÉE, BELL MOBILITY INC., BRAGG COMMUNICATIONS INC., CITYWEST CABLE AND TELEPHONE CORP, COGECO CONNEXION INC.,, COMCENTRIC NETWORKING INC., ECOTEL INC., IRISTEL INC., LEMALU HOLDINGS LTD., 1085459 ONTARIO LTD. O/A KINGSTON ONLINE SERVICES,, MULTIBOARD COMMUNICATIONS INC., 508896 ALBERTA LTD. O/A NETAGO, NEXICOM INC., ROGERS COMMUNICATIONS CANADA INC., SASKATCHEWAN TELECOMMUNICATIONS, SOGETEL INC., STAR SOLUTIONS INTERNATIONAL, INC., TBAYTEL, TERRESTAR SOLUTIONS INC., THOMAS COMMUNICATIONS LTD., VALLEY FIBER LTD., FIBRENOIRE INC. AND XPLORNET COMMUNICATIONS INC. AND ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	FEBRUARY 22, 2022
JUDGMENT AND REASONS:	DINER J.
DATED:	MAY 16, 2022

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