Federal Court Cour fédérale

Date: 20140102

Docket: T-1405-13

Citation: 2014 FC 1

Ottawa, Ontario, January 2, 2014

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

TELUS COMMUNICATIONS COMPANY

Applicant

And

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the authority of the Minister of Industry (Minister) concerning the issuance of spectrum licences for the 700 MHz band pursuant to the *Radiocommunication Act*, RSC, 1985, c R-2 (*RA*). This application seeks declaratory relief and an order of prohibition and is made pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985 c F-7 (*FCA*).

Factual Background

[2] The radio frequency spectrum is divided into bands of frequencies which are designated for use by radiocommunication services, each of which is given a particular priority of access in various bands. The Minister, through the *Department of Industry Act*, SC 1995 c 1 (*DIA*), the *RA* and the *Radiocommunication Regulations*, SOR/96-484 (the Regulations) and with regard to the objectives of the *Telecommunications Act*, SC 1993, c 38 (*TA*), is responsible for spectrum management in Canada. Industry Canada issued a Spectrum Policy Framework for Canada in 1995 with revised or renewed versions following, including one dated June 2007.

[3] The Minister determined that spectrum sufficient to enable wireless network expansion and new broadband technologies would be needed to foster the continued growth of wireless broadband. To that end, he made available spectrum in the 700 MHz band for commercial mobile systems. In anticipation that demand for the highly desired 700 MHz spectrum would exceed supply, the Minister decided that spectrum would be offered by way of an auction as had been previously done. In that regard, the Minister commenced an initial consultation process which culminated in Industry Canada releasing a report on November 30, 2010 entitled “Consultation on a Policy and Technical Framework for the 700 MHz Band and Aspects Related to Commercial Mobile Spectrum” (Consultation). The Consultation addressed specific mechanisms potentially applicable to the 700 MHz auction to promote a competitive marketplace including spectrum aggregation limits (spectrum caps) and set-asides. It also divided Canada into 14 different service areas for auction purposes.

[4] Spectrum caps restrict the amount of spectrum that any eligible bidder can purchase in a particular geographic region. A spectrum cap utilized in a 2001 auction, to ensure that new entrants had access to sufficient spectrum to compete with existing carriers, had resulted in two new licensees.

[5] The Consultation sought industry input with respect to the potential spectrum set asides or caps for licences in the 700 MHz band. Telus, and others, filed submissions in response.

[6] In March 2011, Industry Canada released "A Framework for Spectrum Auctions in Canada." This stated, amongst other things, that measures available to the government to promote a competitive post-auction market include restricting the participation of certain entities in an auction and/or placing limits on the amount of spectrum that any one entity may hold by using spectrum set-asides or spectrum aggregation limits.

[7] In April 2012, Industry Canada published the "Consultation on a Licensing Framework for Mobile Broadband Services (MBS) 700 MHz" (Consultation, 2012) thereby initiating a consultation on a licensing framework for those services. Industry Canada sought comments on licensing considerations related to auction format, rules and processes, as well as on licence conditions for spectrum in the 700 MHz band. Comments on the proposed wording of licence conditions relating to the spectrum aggregate limits and to transferability and divisibility were sought. Telus and others again filed submissions in response.

[8] In March 2012, Industry Canada released the "Policy and Technical Framework, Mobile Broadband Services (MBS) – 700 MHz Band, Broadband Radio Service (BRS) – 2500 MHz Band" (Policy and Technical Framework). This stated that, through its release, Industry Canada announced the decisions resulting from the prior consultation processes. Industry Canada, amongst other things, stated that it had been determined that targeted measures related to the 700MHz and 2500MHz auctions were required to support the objectives of sustained competition, robust investment, improvement of mobile services in rural areas and public safety and security. Further, that spectrum caps were more appropriate than set-asides.

[9] The decisions on the mechanisms to promote competition in the 700MHz auction were summarized as follows (Section B3 generally, page 29):

> B3-1: A spectrum cap of two paired frequency blocks in the 700MHz band (blocks A, B, C, C1 and C2) is applicable to all licences.
>
> B3-2: A spectrum cap of one paired spectrum block from within blocks B, C, C1 and C2 is applicable to all large wireless service providers. Large wireless service providers are defined as companies with 10% of more of national wireless subscriber market share, or 20% or more wireless subscriber market share in the province of the relevant licence area.
>
> B3-3: Unpaired blocks D and E in the Lower 700 MHz band are not subject to a spectrum cap.
>
> …
>
> B3-6: The spectrum caps put in place for the 700 MHz auction will continue to be in place for five years following licence issuance. Therefore, no transfer of licences or issuance of new licences will be authorized if it allows a licensee to exceed the spectrum cap during this period.

[10] In March 2013, Industry Canada released the "Licensing Framework for Mobile Broadband Services (MBS) 700 MHz Band" (Licensing Framework) which stated that it was thereby announcing the decisions resulting from its prior consultation on that topic. The Licensing Framework was described as a companion document to the Policy and Technical Framework. It set out the rules and procedures for participation in the competitive licensing process for spectrum in the 700 MHz band including details of the auction format and rules, the application process and timelines and the conditions on licences that will apply. It noted that policy decisions relating to the licencing process for spectrum in the 700 MHz band were announced in the Policy and Technical Framework and that the licences to be auctioned would be consistent with those decisions.

[11] The decision as to the wording for the relevant conditions of licence, which had been commented on by Telus, was set out as follows:

> The licensee must comply with the spectrum aggregation limits as follows:
>
> - A limit of two paired spectrum blocks in the 700 MHz and within blocks A, B, C, C1 and C2 is applicable to all licences;
> - A limit of one paired spectrum block within blocks B,C, C1 and C2 is applicable to all licences which are large wireless service providers. Large wireless service providers are defined as companies with 10% or more of the national wireless subscriber market share, or 20% or more of the wireless subscriber market share in the province of the relevant licence area…
>
> These spectrum aggregation limits will continue for five years from the date of licence issuance. No transfer of licence of issuance of new licences will be authorized if it would result in a

> licensee exceeding in spectrum aggregation limits during this period. ….

[12] Telus, a large wireless service provider as defined in the Policy and Technical Framework, is affected by these decisions and conditions because the result of the auction process will be that it will not be issued licences for more than one block of spectrum in blocks B, C, C1 and C2.

[13] Telus submits that these two conditions, or decisions as they are described in the Policy and Technical Framework and the Licensing Framework, are in fact eligibility criteria. However, that the Minister has no authority to apply any criteria other than those prescribed in the Regulations in determining the eligibility of Telus or others who seek to be issued licences pursuant to the *RA*. The Minister has therefore exceeded his jurisdiction and his decisions are unlawful.

[14] The auctioning of the 700 MHz band, in which Telus intends to participate, is scheduled to take place on January 14, 2014. Accordingly, Telus sought to have its application for judicial review heard on an expedited basis.

Legislative Background

[15] As the issue on this application concerns statutory interpretation regarding the scope of the Minister's authority, the relevant legislative provisions are reproduced in whole in Annex A of this decision and are summarized below.

The *RA*

[16] Sections 2, 5(1), 5(1.1), 5(1.2), 5(1.4) and 6(1)(b) of the *RA* are relevant to this proceeding. Section 2 defines “radio authorization” as a licence, certificate or authorization issued by the Minister under paragraph 5(1)(a). Section 5(1) confers authority on the Minister, subject to any regulations made pursuant to section 6, to issue radio licences (s. 5(1)(a)(i)) and spectrum licences (s. 5(1)(a)(i.1)) and to fix the terms and conditions thereof (s. 5(1)(a)(v)) as well as to plan the allocation and use of the spectrum (s. 5(1)(e)) and do any other thing necessary for the administration of the *RA* (s. 5(1)(n)). In addition, section 5(1.1) states that in exercising his section 5(1) powers the Minister may have regard to the objectives of the Canadian telecommunications policy as set out in section 7 of the *TA*. Section 5(1.2) states that in exercising his section 5(1)(a) powers to issue radio authorizations the Minister may use a system of competitive bidding to select the persons to whom they will be issued. Section 5(1.4) provides that the Minister may establish procedures, standards and conditions, including bidding mechanisms, minimum bids, bidders' qualifications, acceptance of bids, and others, in regard to a system of competitive bidding to select the persons to whom radio authorization will be issued.

[17] Section 6(1)(b) of the *RA* confers on the Governor-in-Council the authority to make regulations prescribing the eligibility of persons to whom radio authorizations may be issued. As stated above, by definition, radio authorizations include both radio licences and spectrum licences. The Regulations are silent with respect to spectrum licence eligibility.

The Regulations

[18] The Governor-in-Council has exercised its regulatory authority by promulgation of the Regulations. Part I of the Regulations concerns radio licences and provides the principal terms of such licences, including restriction in use, eligibility requirements, assignability and exempted radio apparatus. Section 9(1) identifies persons eligible to be issued radio licences as radio communication users or service providers and concerns citizenship or residency status of individuals, corporate status of Canadian companies, participants in partnerships or joint ventures, governments, ship and aircraft owners and others. Section 10(1) identifies persons eligible to be issued radio licences as radio communication carriers and concerns the status of individuals, partnerships or joint ventures, government and corporations in the context of Canadian ownership and control.

The *DIA*

[19] Sections 4(1) and 5 of the *DIA* are also relevant to this proceeding. Subsection 4(1) sets out the Minister's powers, duties and functions and provides that these extend to and include all matters over which Parliament has jurisdiction "not by law assigned to any other department, board or agency of the Government of Canada" relating to telecommunications (s.4(1)(k)). Section 5 sets out the objectives which guide the exercise of Ministerial authority under section 4(1) including the promoting of the establishment, development and efficiency of Canadian communications systems and facilities and the assisting in the adjustment to changing domestic and international conditions (s. 5(g)), stimulating investment (s. 5(h)), and promoting the interests and protection of Canadian consumers (s. 5(i)).

The *TA*

[20] Section 7 of the *TA* sets out the Canadian telecommunications policy objectives. Section 16 describes the eligibility requirements for operating as a telecommunications common carrier and section 22(1) provides the Governor-in-Council's regulatory authority in relation to Canadian carriers' eligibility, under section 16, to operate as telecommunications common carriers.

Issues

[21] The Applicant states that the sole issue in this application is whether the Minister has the jurisdiction to prescribe criteria for the eligibility of persons to be issued spectrum licences and to fix terms and conditions for such licences that include eligibility criteria, other than those prescribed by the Governor-in-Council.

[22] The Respondent states the issues as follows:

- Is the application out of time?
- What is the applicable standard of review?
- Was the Minister's decision reasonable?

[23] As is apparent, the parties have significantly diverged in their framing of the major issue in this application, with the Applicant framing it as a jurisdictional issue while the Respondent sees it as a question of the reasonableness of the Minister's decisions. In my view, the issues are properly framed as follows:

1. Is this application out of time pursuant to subsection 18.1(2) of the *FCA*?

2. What is the applicable standard of review?

3. Did the Minister act outside his authority in prescribing the subject conditions for the issuance of spectrum licences for the 700 MHz frequency band?

Issue 1: Is this application out of time pursuant to subsection 18.1(2) of the *FCA*?

Respondent's Submissions

[24] The Respondent submits that Applicant is challenging a discrete Ministerial policy decision to which the 30 day time limit imposed by section 18.1 of the *FCA* applies and, therefore, that the application should be dismissed as it was brought out of time.

[25] The Applicant learned of the Minister's policy decision to use a spectrum cap system in March of 2012 by way of the Policy and Technical Framework and again in March 2013 by the Licensing Framework. Although the Applicant could have initiated the application for judicial review at that time it chose not to do so until some seventeen months later, in August of 2013, and is therefore wholly out of time. The decision at issue is not an ongoing "course of conduct" or an evolving policy scheme (*Apotex Inc v Canada (Minister of Health)*, [2011] FCJ No 1593 (QL) at para 20 (TD), aff'd 2012 FCA 322 at para 8 [*Apotex 2012*]; *Canada (Attorney General) v Trust Business Systems*, 2007 FCA 89 at para 20 [*Trust Business*]). It is one of a set of specific policy decisions, made at fixed points in time, that include, among other things, how the auction on January 14, 2014 will be conducted. The Applicant injects uncertainty into the auction and undermines the purposes of section 18.1(2).

Applicant's Submissions

[26] The Applicant submits that no decision has been reached in this case yet nor will there be until the results of the auction are known and the Minister decides to whom licences will be issued. Thus, the application is not in respect to a particular "decision" pursuant to section 18.1(2) of the *FCA*. Rather, it is in respect of a "matter" under section 18.1(1) of the *FCA* being the Minister's policy of refusing to issue spectrum licences authorizing the use of a second block of spectrum to large wireless service providers. The 30 day limitation period contained in section 18.1(2) does not apply to an application concerning a challenge to the legality or jurisdiction to create an ongoing policy (*Apotex v Canada (Minister of Health)*, 2010 FC 1310 at para 10 [*Apotex*]; *Airth v Canada (National Revenue)*, 2006 FC 1442 at paras 9-10 [*Airth*]; *Sweet v R*, (1999) 249 NR 17, [1999] FCJ No 1539 (QL) at para 11 (CA) [*Sweet*]; *May v CBC/Radio Canada et al*, 2011 FCA 130 at para 10 [*May*]; *Krause v Canada*, [1999] 2 FC 476, [1999] FCJ No 179 (QL) (CA) [*Krause*]).

[27] Further, if the Applicant waits until the auction to receive a decision on the issuance of licences and then applies for judicial review of that decision this would cast doubt on the validity of the auction and, based on *May*, above, it is uncertain that an expedited hearing would be permitted.

Analysis

[28] Section 18.1 of the *FCA* states that an application for judicial review may be made by the Attorney General or by anyone directly affected by the "matter" in respect of which relief is sought. Section 18.1(2) states that an application for judicial review "in respect of a decision or an order" of a federal board, commission or other tribunal shall be made within 30 days of communication of the decision.

[29] Accordingly, where the subject matter of a judicial review is a "matter", rather than a "decision or order," the 30 day time limit does not apply (*Krause*, above, at para 23; *Airth*, above, at paras 5, 10). Therefore, the question is whether the Applicant is seeking judicial review of a decision or of a matter.

[30] Both the Policy and Technical Framework and the Licensing Framework describe the determinations of the Minister as "decisions." The Respondent, in its submissions, describes the Minister's determinations as policy decisions.

[31] In *Krause*, above, the Federal Court of Appeal held that the time limit imposed by subsection 18.1(2) did not bar the applicants from seeking relief by way of mandamus, prohibition and declaration. In that case, while there was a general decision to adopt the 1988 recommendations of the Canadian Institute of Chartered Accountants and to implement those recommendations in each of the following fiscal years, that general decision was not what was being challenged. Rather, the acts of the responsible Ministers in implementing that decision were alleged to be invalid or unlawful. The Court stated the following:

> [23] …The charge is that by acting as they have in the 1993-1994 and subsequent fiscal years the Ministers have contravened the relevant provisions of the two statues thereby failing to perform their duties, and that this conduct will continue unless the Court intervenes with a view to vindicating the rules of law…
>
> [24] I am satisfied that the exercise of the jurisdiction under section 18 does not depend on the existence of a "decision or order". In *Alberta Wilderness Assn v. Canada (Minister of Fisheries and Oceans)*, Hugessen J. was of the view that a remedy envisaged by that section "does not require that there be a decision or order actually in existence as a prerequisite to its exercise". In the present case, the existence of the general decision to proceed in accordance with the recommendations of the Canadian Institute of Chartered Accountants does not, in my view, render the subsection 18.1(2) time limit applicable so as to bar the applicants from seeking relief by way of mandamus, prohibition and declaration. Otherwise, a person in the position of the applicants would be barred from the possibility of ever obtaining relief under section 18 solely because the alleged invalid or unlawful act stemmed from a decision to take the alleged unlawful step. That decision did not of itself result in a breach of any statutory duties. If such a breach occurred it is because of the actions taken by the responsible Minister in contravention of the relevant statutory provisions."

[32] The Respondent submits that *Krause*, unlike this situation, was not a direct challenge to a decision. Further, unlike *Krause*, this is not a situation of an ongoing course of conduct. On the other hand, the Applicant submits that *Krause* is an example of an ongoing course of conduct as is the situation in this case. Further, as stated by the Federal Court of Appeal in *Moresby Explorers Ltd v Canada (Attorney General)*, 2007 FCA 273 at para 24 [*Moresby*], it stands for the proposition that, "because illegality goes to the validity of the policy rather than to its application, an illegal policy can be challenged at anytime; the claimant need not wait till the policy has been applied to his or her specific case."

[33] *Sweet*, above, concerned a policy of involuntary "double-bunking" in a correctional institution. There, the Federal Court of Appeal stated the following:

> [11] What the appellant is attacking is not so much the decision of the Correctional Service of Canada ("the Service") to force him to share a cell, as much as the policy of double-bunking in itself. The thrust of the appellant's argument is that the policy of double-bunking, which affects the appellant and many other inmates, should be declared invalid. That policy is an on-going one which may be challenged at any time; judicial review, with the associated remedies of declaratory, prerogative and injunctive reliefs, is the proper way to bring that challenge to this Court (see Krause v. Canada, [1999] 2 F.C. 476 (F.C.A.)).

[34] In *Apotex*, above, at para 10, Justice Pinard, in referring to *Airth*, above, held that a matter is distinguished from a decision or order by considering whether what is at issue is a "singular decision" or instead "part of a course of conduct, all of which the Applicant challenges." Justice Pinard recognized that the applicant therein was seeking relief arising out of a number of decisions and other conduct of the same decision-maker, operating under the same statute and arising out of the same factual matrix. While it was a debatable issue as to whether the applicant's attack was on a decision or a matter, Justice Pinard found that this ought to be determined by the applications judge.

[35] Subsequently, Justice Barnes dismissed the application on the basis that it was made in an untimely manner (*Apotex Inc v Canada (Health)*, 2011 FC 1308) and, in doing so, he distinguished *Krause*, above finding that it was concerned with the lawfulness of implementing policy on an ongoing basis. The case before him involved a challenge to three distinct administrative decisions. Justice Barnes stated the following:

> [19] In *Manuge*, above, I made a similar point in the following passage:

> 17 There is no question that much of what was of concern to the Court in Grenier and in its earlier decisions in *Tremblay v. Canada*, 2004 FCA 267, 2004 FCA 267, [2004] 4 F.C.R. 165 and in *Budisukma Puncak Sendirian Berhad v. Canada*, 2005 FCA 267, 338 N.R. 75, had to do with the desire for finality around administrative decisions and to ensure that appropriate deference was accorded to the decision maker (see, for example, paras. 27 to 30 in *Grenier*). The Court was also rightfully concerned about a process which would allow a party to collaterally attack a decision well beyond the 30-day time limit for bringing an application for judicial review. All of these are concerns that carry much less significance in a case where the challenge is limited to the lawfulness of a government policy and where the application of that policy has on-going implications for the party affected. It is also perhaps noteworthy that in *Grenier*, *Tremblay* and *Berhad*, the Court's discussion of these policy considerations invariably referred to the lawfulness of the underlying decisions and no explicit reference was made to challenges to government policy, legislation, or conduct. In *Tremblay*, the Court also noted "the fine line that exists between a judicial review and a court action" where extraordinary remedies are sought.

[36] Justice Barnes held that allowing Apotex to avoid the 30-day filing requirement would open the door to a multitude of similar belated applications and thereby effectively extinguish the time limit requirement. It would also sidestep the need for finality for discrete administrative decisions which were, as in that case, directly attacked as unlawful. He found that Apotex's position was no more than a colourable device intended to permit it to avoid violating both the letter and the spirit of section 18.1(2) of the *FCA* and Rule 302 of the *Federal Courts Rules*, SOR/98-106.

[37] The Applicant relies heavily on the decision in *May*, above. There, Elizabeth May, then leader of the Green Party, commenced an application for judicial review of a Canadian Radio-television and Telecommunications Commission's (CRTC) Broadcast Information Bulletin issued pursuant to the *Canada Elections Act*. The Bulletin required the CRTC to issue, within 4 days of the election writ being dropped, a set of guidelines pertaining to the applicability of the *Broadcasting Act* and its *Regulations* to the conduct of broadcasters during a general election. The Bulletin referred to the CRTC's 1995 Guidelines to the effect that not all party leaders need be included in the leaders' debates, as long as equitable coverage of all parties is provided. Ms. May submitted that the Bulletin was ultra vires the CRTC's powers. The issue before the Federal Court of Appeal was whether to allow Ms. May's motion for an expedited hearing of the judicial review.

[38] Ms. May argued that she had no choice but to seek urgent relief because the administrative action affecting her rights, the Bulletin, was issued only after the election writ was dropped. If she had brought her application earlier, it would have been premature, and if the hearing were not expedited, it would be moot. Put otherwise, she submitted that the Bulletin was a decision or order within the meaning of subsection 18.1(2) and that judicial review was impossible until such a decision or order had been made.

[39] The Federal Court of Appeal did not agree with Ms. May's position and ultimately dismissed her motion:

> [10] This argument, in my respectful view, is wrong. While it is true that, normally, judicial review applications before this Court seek a review of decisions of federal bodies, it is well established in the jurisprudence that subsection 18.1(1) permits an application

> for judicial review "by anyone directly affected by the matter in respect of which relief is sought". The word "matter" embraces more than a mere decision or order of a federal body, but applies to anything in respect of which relief may be sought: Krause v. Canada, [1999] 2 F.C. 476 at 491 (F.C.A.). Ongoing policies that are unlawful or unconstitutional may be challenged at any time by way of an application for judicial review seeking, for instance, the remedy of a declaratory judgment: Sweet v. Canada (1999), 249 N.R. 17.
>
> [11] Here the impugned CRTC Bulletin contains a reference to the Guidelines, which contain the same impugned rule. In fact, the same impugned rule has applied to leaders' debates in federal elections since 1995. As such, it qualifies as an "ongoing policy" that could have been and can be challenged at any time by the applicant. Consequently, the applicant did into need to wait until the Bulletin for the 2011 general election was issued to bring her application.

[40] In *Fisher v Canada (Attorney General)*, 2013 FC 1108 (*Fisher*), an amendment was passed requiring offenders on parole-reduced status to comply with paragraph 161(1)(a) of the *Corrections and Conditional Release Regulations*, from which they had been previously exempt by virtue of subsection 133(6) of the *Corrections and Conditional Release Act*. The applicant alleged that the practical effect of the amendment was that it granted his parole officers the discretion to change his terms of parole and also meant that the applicant had to report in person every three months. With respect to the timeliness of his application for judicial review, Justice Russell agreed with the applicant that the amendment was more in the nature of an ongoing policy that was unlawful and unconstitutional and which may be challenged at any time by way of an application for judicial review. In that case, at issue were the acts done in implementing the decision.

[41] In the present application for judicial review, the Applicant's stated challenge is that the Minister does not have the legal authority to make decisions or impose spectrum licence conditions which, the Applicant submits, have the effect of prescribing eligibility criteria in respect of the granting of those licences. The Applicant seeks relief in the nature of a declaration and a prohibition order.

[42] The Minister's decision to attach the subject conditions on any spectrum licences that large wireless service providers may ultimately successfully bid on was made through the Policy and Technical Framework and restated in the Licensing Framework. The Licensing Framework states that the "conditions will apply to all licences issued through the auction process for spectrum in the 700 MHz band". Therefore, in my view, these are decisions which will be unaffected by the ultimate auction process. To that extent, those decisions have been made and they are discrete. They apply to specific spectrum access in specific geographic areas for specific time periods. However, they were made within the context of the Policy and Technical Framework and, therefore, form part of a policy which is ongoing. By issuing the licences with the attached conditions, the Minister will be acting upon policy.

[43] Given this, and based on *Moresby*, above, which interpreted *Krause* to stand for the proposition that "because illegality goes to the validity of the policy rather than to its application, an illegal policy can be challenged at anytime…," and the broad definition given to the term "matter" in *May*, I have concluded that the present issue falls within section 18.1 and therefore the 30 day limit has no application.

Issue 2: What is the standard of review?

Applicant's Submissions

[44] The Applicant submits that the standard of review is correctness because the dispute in this case involves a true question of vires, concerning the drawing of a jurisdictional line between two competing entities which are the Minister and the Governor-in-Council. The Minister does not have legal expertise superior to that of a Court in respect of jurisdictional delineation (*Smith v Alliance Pipeline Ltd*, 2011 SCC 7, [2011] 1 SCR 160 at para 26 [*Alliance*]; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Federation*, 2011 SCC 61, [2011] 3 SCR 654 at paras 30-31 [*Alberta Teachers*]; *Bell Canada v Canada (Attorney General)*, 2011 FC 1120 at para 16; *Goodwin v Canada (Attorney General)*, 2005 FC 1185 at paras 22-24).

Respondent's Submissions

[45] The Respondent submits that the Minister's decision is a mixed question of fact, discretion, and policy such that deference will usually apply automatically (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paras 46-47, 53, 62-64 [*Dunsmuir*]). Other than in exceptional circumstances, the interpretation by a tribunal of its own statute or statutes closely connected to its function are presumed to be questions of statutory interpretation and subject to deference (*Alberta Teachers*, above at paras 30, 34 and 39). The Respondent submits that there are in fact two decisions of concern in this application: the Minister's interpretation of his "home" and closely connected statutes, and, the Minister's decision to use a spectrum cap.

[46] The Minister interpreted his powers to include the ability to define measures to promote a competitive post-auction marketplace by use of a spectrum cap system. This situation is not

unlike the situation in *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 48-50. The Minister's decision to use a spectrum cap is a pure policy decision and, therefore, it can only be challenged on limited grounds (*Moresby*, above, at para 24).

[47] Further, if the Applicant seeks to invoke a true question of jurisdiction, it is required to demonstrate why the court should not review a tribunal's interpretation of its home statute on the deferential standard of reasonableness (*Alberta Teachers*, above at paras 46-47).

Analysis

[48] The first step in determining the appropriate standard of review is to ascertain whether existing jurisprudence has already resolved, in a satisfactory manner, the degree of deference to be afforded a particular category of question. If it has not, then the Court must engage the second step, which is to determine the appropriate standard having regard to the nature of the question, the expertise of the tribunal, the presence or absence of a privative clause, and the purpose of the tribunal (*Dunsmuir*, above, at paras 51-64; *Agraira*, above, para 48).

[49] The Notice of Application challenges the Minister's authority to prescribe eligibility criteria for persons seeking to be issued spectrum licences for the 700 MHz band. This authority involves interpreting the provisions of the *RA,* the Regulations and the provisions of the closely related *DIA* and the *TA*. As there is no jurisprudence directly on point considering the applicable standard of review, this Court must follow the second stage analysis of *Dunsmuir*, above.

[50] As is apparent from the parties' submissions, the crux of the question of the standard of review applicable to this matter is the nature of the question that is before this Court.

[51] There is clear authority that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir*, above, at para 54; *Alliance*, above, at para 28). This principle applies unless the interpretation of the home statute falls into one of the categories of questions to which the correctness standard continues to apply. As the Supreme Court of Canada stated in *Alliance,* above:

> [26] Under *Dunsmuir*, the identified categories are subject to review for either correctness or reasonableness. The standard of correctness governs: (1) a constitutional issue; (2) a question of "general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'" (*Dunsmuir*, at para. 60 citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62); (3) the drawing of jurisdictional lines between two or more competing specialized tribunals; and (4) a "true question of jurisdiction or *vires*" (paras. 58-61). On the other hand, reasonableness is normally the governing standard where the question: (1) relates to the interpretation of the tribunal's enabling (or "home") statute or "statutes closely connected to its function, with which it will have particular familiarity" (para. 54); (2) raises issues of fact, discretion or policy; or (3) involves inextricably intertwined legal and factual issues (paras. 51 and 53-54).

(See also: *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53, [2011] 3 SCR 471 at para 18; *Dunsmuir,* above, at paras 58, 60-61).

[52] In *Alberta Teachers*, above, Justice Rothstein, writing for the majority, noted that the "true questions of jurisdiction" category "has caused confusion to counsel and judges alike." He found that he was unable to define a true question of jurisdiction, but stated:

> [39] What I propose is, I believe, a natural extension of the approach to simplification set out in *Dunsmuir* and follows directly from *Alliance* (para. 26). True questions of jurisdiction are narrow and will be exceptional. When considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness. As long as the true question of jurisdiction category remains, the party seeking to invoke it must be required to demonstrate why the court should not review a tribunal's interpretation of its home statute on the deferential standard of reasonableness.

[53] At paragraph 42, Justice Rothstein further stated that, "The practical approach is to direct the courts and counsel that at this time, true questions of jurisdiction will be exceptional and, should the occasion arise, to address in a future case whether such category is indeed helpful or necessary." *Alberta Teachers* involved the issue of interpreting section 50(5) of the *Personal Information Protection Act*, the Information and Privacy Commissioner's home statute. Specifically, whether an inquiry automatically terminated as a result of the Commissioner extending the 90 day period only after the expiry of that period. The Court found that the issue did not fall into any of the categories to which the correctness standard applied. The Commissioner was interpreting his own statute and the reasonableness standard applied. In my view, that case can be distinguished because the interpretation issue there did not involve a clear question of jurisdiction as between two entities with authority to administer the same statute as in this situation as regards to the Minister and the Governor-in-Council.

[54] It is of note that subsequent to *Alberta Teachers'*, true questions of jurisdiction pertaining to the interpretation of a tribunals' or Minister's home statute have continued to be identified by the Courts. One of these cases is *Canada (Fisheries and Oceans) v David Suzuki Foundation*, 2012 FCA 40. There, Justice Mainville found that the question raised by that appeal, which involved the meaning of the words "legally protected by provisions in, or measures under, this or any other Act of Parliament" found in subsection 58(5) of the *Species At Risk Act* (SARA), was a question of statutory interpretation, and was to be reviewed on a correctness standard. He did not accept the Minister's submission that a presumption of deference applied because the Minister was interpreting a provision of his home statute or statutes closely connected to its functions.

[55] Justice Mainville found that the following factors leaned towards a correctness standard:

- there was no privative clause in the statutes before him including the *Fisheries Act*;
- there was indication in the SARA that Parliament had greatly restricted the Minister's discretion;
- the Minister acted in an administrative capacity, and not as an adjudicator under the provision at issue;
- the question in issue was one of statutory interpretation which the courts were best equipped to answer in the circumstances of that case; and
- while the Minister had expertise in fisheries, this did not necessarily confer special legal expertise to interpret the statutory provisions of the SARA or of the *Fisheries Act*.

[56] And, in the recent decision of *Clare v Canada (Attorney General)*, 2013 FCA 265, the Court found that whether or not the Canadian Agricultural Review Tribunal had the legal authority to grant an extension of time for requesting a review of a violation issued by the Canadian Food Inspection Agency is a question of statutory interpretation and that:

> [10] This Court has established that the standard of review applicable to questions of statutory interpretation made by the Tribunal is correctness: *Doyon v. Canada (Attorney General)*, 2009 FCA 152 (CanLII), 2009 FCA 152 at paragraphs 30-32 (*Doyon*); *Canada (Attorney General) v. Porcherie des Cèdres Inc.*, 2005 FCA 59 (CanLII), 2005 FCA 59 at paragraph 13; *Canada (Canadian Food Inspection Agency) v. Westphal-Larsen*, 2003 FCA 383 (CanLII), 2003 FCA 383 at paragraph 7 (*Westphal-Larsen*).

[57] Recently, in *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 [*McLean*], the Supreme Court of Canada found that a reasonableness standard applied to the question of determining, for the purposes of section 161(6)(d) of the *Securities Act*, "the events" that trigger the six-year limitation period in section 159. The Court found that the presumption of deference to an administrative decision maker's interpretation of its home statute or statutes closely connected to its function had not been rebutted. There, it was solely the Commission that was tasked with considering the legal question of interpreting the subject provisions in the first instance, and there was no possibility of conflicting interpretations with respect to the question at issue.

[58] Further, at paragraph 22, the Court stated that the presumption endorsed in *Alberta Teachers*, "is not carved in stone" as the Court "has long recognized that certain categories of questions - even when they involve the interpretation of a home statute - warrant review on a

correctness standard (*Dunsmuir*, at paras, 58-61)". Further, "a contextual analysis may rebut the presumption of reasonableness review for questions involving the interpretation of the home statute" (*Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 SCR 283, at para 16). Thus, in *McLean*, the Court again acknowledged that *Alberta Teachers* ultimately left the door open to questions raising a true issue of vires or jurisdiction, even when the interpretation of a decision maker's home statute is involved.

[59] In my view, and as acknowledged by the Applicant at the hearing of this matter, the present case is not a challenge to the wisdom or soundness of a government policy, but is a question of whether there is authority to enact decisions made under a policy. The Applicant has not challenged the reasonableness of the Minister's decision to impose conditions on spectrum licences in the 700 MHz band. While the interpretation of the Minister's home and closely related statutes is involved, the nature of the question posed to this Court is one of true jurisdiction in that a jurisdictional line between the authority of the Minister and the Governor-in-Council is at issue. Therefore, this is a question of statutory interpretation of the nature which attracts a correctness standard of review.

[60] Moreover, the *RA* does not contain a privative clause, the Minister did not act in an adjudicative capacity, and, while the Minister has expertise in telecommunications, this does not necessarily confer special legal expertise to interpret the relevant statutory provisions to delineate authority as between the Minister and the Governor-in-Council which is also a question that the Court is better able to answer in these circumstances.

[61] Accordingly, in my view, correctness is the appropriate standard of review on this application.

Issue 3: Did the Minister act outside his authority in prescribing the subject conditions for the issuance of spectrum licences for the 700 MHz frequency band?

Applicant's Submissions

[62] The Applicant submits, in essence, that while the Minister has the authority to issue spectrum licences and to fix terms and conditions, this is subordinate to the Governor-in-Council's regulation making function and it is only the latter who has the authority to determine who shall be eligible to be granted spectrum licences.

[63] Section 4(1) of the *DIA* defines the scope of the Minister's powers, duties and functions which includes telecommunication matters, including spectrum management. However, this authority is limited to the extent that any such matter is not otherwise assigned by law to any other department, board or agency of the Government of Canada. In that regard, section 6(1) of the *RA* confers authority on the Governor-in-Council to make regulations relating to a broad range of matters including spectrum management. Pursuant to this power, the Governor-in-Council has enacted the Regulations which include "prescribing the eligibility of persons to whom radio authorizations, or any class thereof, may be issued" by the Minister (section 6(1)(b)).

[64] The Applicant submits that the Governor-in-Council is a "department, board or agency of the Government of Canada" within the meaning of section 4(1) of the *DIA* (*Saskatchewan Wheat*

Pool v Canada (Attorney General) (1993), 107 DLR (4th) 190 at para 6 (FCTD) [*Saskatchewan Wheat Pool*]; *Aviation Roger Forgues Inc v Canada (Attorney General)*, 2001 FCT 196; *Momi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 738 at para 8 [*Momi*]). Therefore, the effect of section 6(1)(b) of the *RA* when read together with section 4(1) of the *DIA*, is to exclude from the Minister's powers, duties and functions, the power to address matters relating to the eligibility of persons to hold spectrum licences.

[65] The Minister's intention to refuse to issue licences authorizing use of a second block of spectrum to large wireless service providers relates to "eligibility" and is therefore, beyond his jurisdiction. Section 5(1) provides the Minister with authority to select licensees from those who are eligible, but this authority does not extend to deciding who shall be eligible, which is a legislative authority conferred on the Governor-in-Council (*Procureur Général du Canada v La Compagnie de Publication La Presse, Ltee*, [1967] SCR 60 at 75-76 [*La Compagnie*]).

[66] The *RA*, the *TA,* and the *Broadcasting Act* form part of the same "interrelated statutory scheme" and where telecommunications and broadcasting are concerned, it is the Governor-in-Council, not the Minister who determines eligibility (*Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, [2012] 3 SCR 489 at para 34 (*Reference Re Broadcasting*); *TA*, ss 16(2); *Canadian Telecommunications Common Carrier Ownership and Control Regulations*, SOR/94-667; *Broadcasting Act*, ss 9(1); *Direction to the CRTC (Ineligibility of Non-Canadians)*, SOR 97-192).

[67] Telecommunications common carriers and broadcasters rely heavily on radiocommunication to provide their services. If the Minister was empowered to determine "eligibility", then the eligibility of a telecommunications common carrier or a broadcaster using spectrum would be determined twice by two different arms of government with the Governor-in-Council in respect of eligibility to operate as a telecommunications common carrier or broadcaster, and the Minister in respect of the use of spectrum by these entities. Statutes with similar subjects must be presumed to be coherent yielding harmonious interpretations (*Reference Re Broadcasting*, above).

[68] Pursuant to section 6 of the *RA*, Parliament has expressly granted power to the Governor-in-Council to determine eligibility which is not included in the list of powers conferred on the Minister in section 5(1). This is a strong indication by Parliament that it did not intend the Minister to have that power (*Tetreault-Gadoury v Canada (Employment and Immigration Commission)*, [1991] 2 SCR 22 at 33). There are also no grounds on which to imply such a power on the basis that the power is "necessarily incidental" to the Minister's explicit powers (*ATCO Gas & Pipeline & Pipeline Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 SCR 140 at para 39 [*ATCO*])).

[69] Consistent with Driedger's approach to statutory interpretation, adopted by the Supreme Court of Canada, the power to issue licences conferred on the Minister by subsection 5(1) of the *RA* must be interpreted in light of subsection 4(1) of the *DIA*, the other provisions of the *RA* including section 6, and the wider statutory scheme of the *TA* and the *Broadcasting Act*.

[70] Section 5(1.4) of the *RA*, which gives the Minister authority to adopt bidding qualifications, does not confer on him the power to prescribe eligibility criteria. While the terms “eligibility” and “qualification” are related, the *RA* uses them differently. Therefore, this must be considered “intentional and indicative of a change in meaning or a different meaning” (*Peach Hill Management Ltd v Canada* (2000), 257 NR 193, [2000] FCJ No 894 (QL) at para 12 (CA)). The term “bidder qualification” as used in the *RA* relates to technical and administrative aspects of the auction process (*R v Daoust*, 2004 SCC 6, [2004] 1 SCR 217 at para 51). The Minister also differentiates between the terms “eligibility” and “bidder qualifications” in the Licensing Framework.

[71] Section 5(1) of the *RA* and section 7 of the *TA* do not confer authority on the Minister to prescribe eligibility criteria. Policy cannot be used as authority to confer jurisdiction (*Barrie Public Utilities v Canadian Cable Television Association*, 2001 FCA 236 at para 53, aff’d 2003 SCC 28; *Canada (Attorney General) v Mowat*, 2009 FCA 309 at para 99, aff’d *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53). Nor does the Minister’s responsibility for “orderly development and efficient operation of Radiocommunication” pursuant to section 5(1) confer authority upon him to prescribe eligibility criteria. It only defines the purposes for which the licensing power may be exercised, but does not expand the Minister’s powers, which remain subject to the Governor-in-Council’s regulatory authority pursuant to section 6.

Respondent's Submissions

[72] The Respondent submits, essentially, that the Minister has the authority to issue spectrum licences and to fix the terms and conditions of such licences. The Minister exercised this authority reasonably in accordance with important policy considerations.

[73] The Respondent submits that the Governor-in-Council is not a "department, board, or agency of the Government of Canada" within the meaning of section 4(1) of the *DIA*. The Applicant has misread the decision in *R v Saskatchewan Wheat Pool*, [1983] 1 SCR 205. Similar language to that effect in another statute has been interpreted to refer to a single governmental minister or minister and not the Governor-in-Council (*Angus v R*, [1990] 3 FC 410 (QL) at paras 22-23 (CA) [*Angus*]).

[74] The *TA* governs telecommunication in Canada generally, with the telecommunications policy objectives set out in section 7 of that statute. The *RA* governs the licencing and regulation of radio apparatus and the use of the radio frequency in Canada. A "radio authorization" is a licence, certificate or authorization issued by the Minister pursuant to section 5(1)(a) of the *RA*. A "radio licence" is a licence issued pursuant to section 5(1)(a)(i) and a "spectrum licence" is issued pursuant to section 5(1)(a)(i.1). A spectrum licence is a radio authorization, but is not a radio licence. The Minister's powers under section 5(1) are broad and include fixing the terms and conditions of licences and planning the allocation and use of spectrum. In exercising his power, the Minister may take into consideration all matters that he considers relevant for the orderly development and efficient operation of radiocommunication in Canada and may have

regard to the telecommunications policy in section 7 of the *TA*. He also has the authority to utilize a competitive bidding process pursuant to sections 5(1.2) and (1.4).

[75] The Governor-in-Council has the power to prescribe eligibility criteria with respect to radio licences, not spectrum licences, pursuant to sections 9 and 10 of the Regulations. As the Applicant conceded, the Governor-in-Council has not exercised its authority to prescribe eligibility criteria applicable to spectrum licences.

[76] The Respondent submits that the Minister's interpretation of his broad powers related to spectrum management was reasonable as it employed a contextual analysis of his home statute, the *RA,* and other closely connected statutes.

[77] In deciding to impose conditions on spectrum licences for the 700 MHz band, the Minister considered all matters relevant to the orderly development and efficient operation of radio communication in Canada. Further, the Minister had the authority to use a system of competitive bidding to select the persons to whom spectrum licences will be issued in the 700 MHz band and to establish procedures, standards and conditions applicable to that system of competitive bidding. The Minister interpreted his powers to include the ability to define measures to promote a competitive post-auction market place by the use of a spectrum cap.

[78] The Respondent submits that if the Governor-in-Council had exclusive authority as suggested by the Applicant, then the Minister's powers would be reduced to that of rubber-stamping the issuance of licences. Even if they applied, the Regulations would serve to prevent

the Minister from offering a licence to anyone who does not meet the threshold eligibility requirements concerning Canadian incorporation and ownership and control, but they would not exhaust the measures that the Minister is legally able to consider. The decision to grant or deny a licence remains a matter of ministerial discretion (Sunny Handa et al, *Communication Law in Canada*, Issue 46 (loose-leaf (consulted on 22 November, 2013), (Lexis Nexis, Canada: September 2013); Michael H. Ryan, *Canadian Telecommunications Law and Regulation* (Carswell, Scarborough, Ontario: 1993). The power to define the conditions for the auction of the 700 MHz band necessarily includes the power to define measures to promote competition by establishing parameters of the spectrum licences (*ATCO*, above, at para 51).

[79] The Respondent submits that the Minister's decision to use a spectrum cap was reasonable as he exercised his discretion in the public interest for the benefit of all Canadians. The rationale for the cap was clearly articulated in the Policy and Technical Framework and in the Licensing Framework. Telus and other large wireless service providers are not ineligible to participate in the auction as they can bid on spectrum within the parameters established by the Minister. The spectrum cap governs how the Minister grants licences for available spectrum in specific geographic areas. It is a temporary restriction specific to the 700 MHz band that functions for a defined period of five years as a condition of the spectrum licences to prevent the transfer from an existing licence to large wireless service providers. It is also a temporary restriction on the ability of large wireless service providers to aggregate prime spectrum in greater amounts in defined geographic areas.

[80] The Respondent states that the Courts have accepted the validity of similar policies that allocate access to a scarce and commercially valuable resource among many applicants or prioritize applicants (*Carpenter Fishing Cop v Canada*, [1998] 2 FC 548 (CA) [*Carpenter Fishing*]; *Association des crevettiers acadiens du Golfe inc v Canada (Attorney General),* 2011 FC 305 [*Association des crevettiers acadiens du Golfe inc*]; *Vaziri v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1159 [*Vaziri*]). Similar considerations are relevant in allocating radiocommunication and which flow from the explicit powers of the Minister to promote the establishment, development and efficiency of communication systems. The Minister's decision is clearly and unequivocally linked to enhancing industry efficiency and competitiveness and is consistent with the mandates under the *DIA* and the *RA*.

[81] Further, the Regulations do not apply to the 700 MHz Band Spectrum auction as they apply to radio licences and not spectrum licences. Therefore, there is no conflict between the regulatory provisions and the Minister's policy decision. The existence of an unused regulation making power does not automatically function to limit the Minister's ability to exercise his statutory discretionary authority (*Vaziri*, above at para 35).

Analysis

[82] The dispute in the present case concerns whether in fixing the conditions on spectrum licences for the 700 MHz band, the Minister acted outside his authority in making a determination on eligibility. That is, whether the conditions imposed by the Minister, in effect, pertain to "eligibility" and are therefore beyond his jurisdiction.

[83] The Minister's authority derives from statute and the Minister can only act within the constraints of that legislated jurisdiction. In *Vaziri*, above, Justice Snider quoted the following from *Greenisle Environmental Inc v Prince Edward Island*, [2005] PEIJ No 41 (QL), 2005 PESCTD 33 at para 17:

> [17] …[it is a] fundamental principle that executive powers are granted by statute and defined and limited by statute. A statutory delegate may make a decision or rule only if authorized by statute to do so. A statutory delegate has no inherent authority…

[84] Accordingly, in the present case, the Court must interpret the relevant statutes and determine whether the Minister acted within his lawful authority.

[85] In *Apotex Inc v Canada (Health)*, 2012 FCA 322, the Federal Court of Appeal provided the following summary of the preferred approach to statutory interpretation as described by the Supreme Court of Canada:

> [24] First, while I agree that it is necessary to review the scope and nature of the Minister's authority under the Regulations, the Regulations must be interpreted in accordance with the preferred approach to statutory interpretation.
>
> [25] This approach has been expressed in the following terms by the Supreme Court of Canada:
>
> > Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

…

[26] The Supreme Court restated this principle in the following terms in Canada Trustco Mortgage Co. v. Canada, 2005 SCC 54, [2005] 2 S.C.R. 601 at paragraph 10 (emphasis added):

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. <u>The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.</u>

…

[28] The proper limit to the use of context was explained in the following way by the majority of the Supreme Court in *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141 at paragraph 15:

> In the interpretation process, the more general the wording adopted by the lawmakers, the more important the context becomes. The contextual approach to interpretation has its limits. Courts

> perform their interpretative role only when the two components of communication converge toward the same point: the text must lend itself to interpretation, and the lawmakers' intention must be clear from the context.
>
> (Emphasis by the Federal Court of Appeal)

[86] Therefore, the words of the statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. In the present case, the relevant statutes are the *RA* and its Regulations, the *DIA*, and the *TA*. In *Reference re Broadcasting*, above, Justice Rothstein found that the *RA*, the *TA* as well as the *Copyright Act* and the *Broadcasting Act*, form part of an interrelated statutory scheme. In my view, the same is true of the *RA*, its Regulations, the *TA* and the *DIA*.

[87] In *ATCO*, above, the Supreme Court of Canada offered further guidance in statutory interpretation which is of relevance in this matter:

> [51] The mandate of this Court is to determine and apply the intention of the legislature (*Bell ExpressVu*, at para. 62) without crossing the line between judicial interpretation and legislative drafting (see *R. v. McIntosh*, 1995 CanLII 124 (SCC), [1995] 1 S.C.R. 686, at para. 26; *Bristol-Myers Squibb Co.*, at para. 174). That being said, this rule allows for the application of the "doctrine of jurisdiction by necessary implication"; the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature (see Brown, at p. 2-16.2; *Bell Canada*, at p. 1756). Canadian courts have in the past applied the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate:

> When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.

[88] The *RA* provides a division of powers between the Minister of Industry and the Governor-in-Council. Pursuant to the *RA*, the Minister has the authority to grant and deny spectrum licences and among other powers, to:

- fix spectrum licence terms and conditions (section 5(1)(a)(i.1));
- plan the allocation and use of the spectrum (section 5(1)(e)); and
- do any other thing necessary for the effective administration of that Act (section 5(1)(n)).

In exercising his powers, the Minister is to take into account all matters that he considers relevant for ensuring the orderly development and efficient operation of radiocommunication in Canada (section 5(1)) and may have regard to the objectives of the Canadian telecommunications policy objectives set out in section 7 of the *TA* (section 5(1.1)).

[89] The Minister is also authorized, when exercising his powers to issue radio licences pursuant to section 5(1)(a), to use a system of competitive bidding “to select the persons whom radio authorizations will be issued” (section 5(1.2)) and to establish procedures, standards and conditions including bidder’s qualifications, in selecting those persons (section 5(1.4)). Parliament has not, however, used the term “eligibility” in section 5(1).

[90] The *RA* empowers the Governor-in-Council to make regulations prescribing the eligibility of persons to whom radio authorizations may be issued including eligibility criteria

based on individual citizenship or permanent residence and corporate residence, ownership and control (section 6(1)(b)); prescribing the qualifications of persons to whom such authorizations may be issued (section 6(1)(c)); the terms and conditions of radio authorizations, including in the case of a radio licence, terms and conditions as to service that may be provided (section 6(1)(e)); conditions and restrictions applicable in respect of any prescribed radio service (section 6(1)(f)); and, otherwise. The authority to make regulations relating to prescribing eligibility for radio authorizations, as well as their terms and conditions, therefore lies with the Governor-in-Council.

[91] As noted above, section 2 of the *RA* defines "radio authorization" as a licence, certificate or authorization issued by the Minister under paragraph 5(1)(a) and comprises both radio licences and spectrum licences. Therefore, the Governor-in-Council can prescribe eligibility criteria for spectrum licences including their terms and conditions. While the Governor-in-Council has effected eligibility requirements respecting "radio licences" in section 9 and 10 of the Regulations, it has not promulgated similar regulations with respect to spectrum licences.

[92] In the result, both the Minister and the Governor-in-Council have the authority to impose terms and conditions on spectrum licences, but only the Governor-in-Council has the authority to prescribe eligibility criteria. The Minister's authority is subject to the Governor-in-Council's power to regulate which has not been exercised in the field of spectrum licences. If the Governor-in-Council chooses to regulate in this area, this would circumscribe the Minister's discretion, but that is not the situation now before us.

[93] This leaves the question of whether by imposing the subject spectrum cap licence conditions, the Minister was making a determination about eligibility. And, if so, whether this falls within the exclusive domain of the Governor-in-Council.

[94] In considering that question, it is significant that the powers granted to the Minister by section 5(1) of the *RA* are broad. Subsection 5(1) provides that in exercising his or her powers, the Minister may take into account all matters relevant ensuring the orderly development and efficient operation of radiocommunication in Canada. Section 5 (1.1) provides that in exercising the powers conferred by subsection (1), the Minister may have regard to the objectives of the Canadian telecommunications policy set out in section 7 of the *TA* which provides the following:

Objectives	Politique
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	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) 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;	(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) to render reliable and affordable telecommunications services of high quality accessible to Canadians in	(b) permettre l'accès aux Canadiens dans toutes les régions — rurales ou urbaines — du Canada à des services de

both urban and rural areas in all regions of Canada;	télécommunication sûrs, abordables et de qualité;
(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;	(c) accroître l'efficacité et la compétitivité, sur les plans national et international, des télécommunications canadiennes;
…	…
(h) to respond to the economic and social requirements of users of telecommunications services; and	(h) satisfaire les exigences économiques et sociales des usagers des services de télécommunication;

[95] The Minister's powers in section 4(1) of the *DIA* are similarly broad and are to be exercised so as to achieve the objectives of Parliament set out in section 5.

[96] Given this, and in accordance with the interpretative approach outlined in *ATCO*, above, reading the provisions of the *RA* which equip the Minister with the authority to impose spectrum licence terms and conditions, together with the policy objectives of both the *TA* and of the *DIA*, it was well within the Minister's authority to impose spectrum caps as a condition of licence. And, in my view, by doing so the Minister did not impose eligibility requirements or transgress into the Governor-in-Council's regulatory powers. I reach this conclusion for the following additional reasons.

[97] First, the imposing of spectrum caps, or aggregation limits, was for the purpose of implementing and furthering the objectives of clearly stated telecommunications policy in the context of the inter-related legislative scheme as a whole and including Canada's

telecommunication policy as set out in section 7 of the *TA*. This purpose is also reflected in the policy objectives contained in the Spectrum Policy Framework which states that it is intended to maximize the economic and social benefits that Canadians derive from the use of radio frequency spectrum. Further, in the policy objectives found in the Policy and Technical Framework which include fostering and sustaining competition in the wireless telecommunications services market for the benefit of consumers.

[98] Pursuant to sections 5(1.2) and 5(1.4) of the *RA*, the Minister also has the authority to use a system of competitive bidding and establish procedures, standards and conditions, including bidders qualifications, in selecting the person to whom a radio authorization will be issued. The fact that such a condition or qualification serves to limit large wireless services providers' ability, as opposed to a right, to acquire desired 700 MHz spectrum band in more blocks does not impose an eligibility requirement, but instead furthers the implementation of the intended policy. Even if eligibility was impacted, this was incidental to the overall intent of Parliament.

[99] The manner in which the Licensing Framework uses the term "eligibility" is also of note. Section 6 of the Licensing Framework is entitled "Conditions of Licence for Spectrum in the 700 MHz Band". It concerns among other items, licence terms (section 6.1), spectrum aggregation limits (section 6.2), licence transferability (section 6.3), eligibility (section 6.4), treatment of existing spectrum uses (section 6.5), radio station installation (section 6.6), provision of technical information (section 6.7), and compliance with legislation, regulation and other obligations (section 6.8). Eligibility is addressed as follows:

> 268. As stated in the consultation, generally, spectrum licences contain an eligibility condition of licence that reads as follows:

> *The licensee must comply on an ongoing basis with the eligibility criteria for a radiocommunication carrier, including compliance with subsection 10(2) of the Radiocommunication Regulations. The licensee must notify the Minister of Industry of any change which would have a material effect on its eligibility. Such notification must be made in advance for any proposed transaction within its knowledge…*

[100] Section 10(2) of the Regulations applies to telecommunications carriers seeking radio licences. Section 9(1) of the Regulations addresses eligibility of persons seeking to be issued radio licences as radiocommunication users or service providers, other than radio communications carriers. Neither of these provisions are applicable to spectrum licences, however, it is significant that the only eligibility requirements that have been imposed by the Governor-in-Council by these sections are primarily concerned with the citizenship or residency of individuals and the ownership and control status of potential corporate licence holders. And, to the extent that the Licensing Framework addresses "eligibility" in the context of spectrum licence terms and conditions, it is confined to the limited references contained in the Regulations.

[101] As indicated in the Framework for Spectrum Auctions in Canada, radio frequency spectrum is a finite public resource which both private users and wireless communications service providers require to offer a diverse range of uses. The Respondent submits that the Courts have accepted the validity of similar policies, such as fisheries quotas (*Carpenter Fishing*; *Association des crevettiers acadiens du Golfe inc*; *Vaziri*, all above), which allocate access to a scarce and commercially valuable resource. This is true, but in the present case, the Applicant does not dispute the substance of the conditions imposed, but rather the authority of the Minister

to impose them. That said, I do agree with the Respondent that similar considerations are relevant in telecommunications policy which flow from the Minister's objectives to promote the efficiency of communication systems and competitiveness and is consistent with his mandates under the *DIA* and the *RA*.

[102] The Applicant relies on *La Compagnie*, above in support of its submission that the Minister only has the administrative discretion to select licensees from among those who are eligible. That case was decided pursuant to the previous *Radio Act* which is now the RA. The Court stated the following:

> …Under s. 4 of the Radio Act, exclusive authority concerning the issue of licences is given to the Minister of Transport. Under s. 3 of the said Act exclusive authority to prescribe the tariff of fees to be paid for such licences is given to the Governor-in-Council. In the one case an administrative discretion has been granted and in the other case an authority to legislate. The Minister of Transport, as the minister responsible for the administration of the Radio Act, is no doubt required to collect the licence fees prescribed by the Governor-in-Council but, except in his capacity as one member of the executive branch of government, he has no authority to determine what the tariff of such fees should be.

[103] In my view, *La Compagnie* is distinguished from the present case. It concerned a provision regarding the authority to prescribe tariffs or fees, a discreet and limited activity. The Court held that the Minister of Transport had the exclusive authority to issue licences while exclusive authority to prescribe the tariff of fees to be paid for such licences was given to the Governor-in-Council.

[104] Here, subject to any regulations made pursuant to section 6, the Minister may issue spectrum licences and fix their terms and conditions. The Governor in Council has the

regulatory authority to prescribe spectrum licence terms and conditions and eligibility criteria. Thus, there is concurrent jurisdiction to impose licence conditions with the Governor-in-Council having exclusive authority to legislate. And, because the Governor-in-Council has not elected to do so with respect to spectrum licences, this permits the Minister to exercise his power and authority to impose licence terms and conditions which may, incidentally, affect eligibility.

[105] Further, if the Applicant's interpretation of *La Compagnie*, above were correct, being that the Minister only has the administrative discretion to select licensees from among those who are eligible pursuant to the Regulations, this would render the telecommunications policy and the Minister's authority to administer it by way of imposing terms and conditions on spectrum licences hollow. That is because, in the absence of regulations prescribing the eligibility of potential spectrum licence holders, there would be no pool to select from, essentially bringing to an end the entire process. Further, eligibility criteria in the Regulations with respect to radio licences, and otherwise, are concerned with the citizenship status of individuals and ownership and control status of corporate potential licence holders. This suggests, therefore, that the Governor-in-Council has decided at present not to circumscribe licensing terms and conditions, such as those at issue in this case, by way of regulation.

[106] As the Respondent submits, even if the Regulations did apply, and thereby precluded the Minister from granting a spectrum licence to anyone who did not meet the threshold requirements concerning Canadian ownership and control, this would not exhaust the other measures that the Minister may lawfully consider such as imposing terms and conditions including spectrum caps on spectrum licences. Satisfaction of the eligibility criteria does not

automatically entitle a person to a licence, and it remains within the Minister's discretion to grant or deny a licence (Ryan, above; Handa, above at para 4.117). Here, Parliament has specifically afforded the Minister discretion to grant or deny a licence in accordance with his mandate and jurisdiction. If the imposition of a spectrum cap has the effect of denying a licence to a particular category of applicants, this is the exercise of a discretionary power and not the unlawful imposition of eligibility criteria.

[107] Moreover, the existence of an unused regulation making power, as in this case, does not function to limit the Minister's ability to exercise his statutory and discretionary authority. In *Vaziri*, above, Justice Snider considered a similar issue, albeit in a different factual circumstances and in the context of the *Immigration and Refugee Protection Act*. She stated the following:

> [30] There are cases, however, that are helpful in analyzing the question before me of the authority of the Minister in the face of an unused regulation making power.
>
> [31] The first of these cases is *Capital Cities Communications Inc. v. Canadian Radio- Television Commission*, [1978] 2 S.C.R. 141. In *Capital Cities*, the Canadian Radio-television and Telecommunications Commission (CRTC) had refused to alter a licence granted to Rogers Cable TV Ltd. based on previous policy statements issued by itself and the Department of Transport. No regulations, upon which the CRTC could have based their decision, had been enacted in spite of the existence of a regulation-making power vested with the Governor in Council under the *Broadcasting Act*. The majority of the Court asked this question (at 170):
>
>> However, absent any regulations, is the Commission obliged to act only ad hoc in respect of any application for a licence or an amendment thereto, and is it precluded from announcing policies upon which it may act when considering any such applications?

[32] As in the present case, in *Capital Cities* the regulatory power under the governing statute was very broad. The majority of the Supreme Court found that it was "eminently proper that [the CRTC] lay down guidelines from time to time", since the governing statute had wide-ranging, embracive objects, the CRTC was given a broad mandate to manage the Canadian broadcasting scheme, and the stated policies were arrived at after input from and consultation with the interested parties.

[33] *Capital Cities* was followed four years later by *CTV*, above. That case dealt with a decision by the CRTC Executive Committee to impose, without regulatory authority, a condition on CTV's broadcasting licence to include a certain amount of Canadian content. The Supreme Court unanimously adopted the reasoning of the Chief Justice of the Court of Appeal's decision that went before them, to the effect that the broad terms found in the objectives of the governing statute authorized the CRTC to impose the licence condition. The CRTC maintained the power to fulfil the objectives of the statute by imposing conditions in an *ad hoc* manner unless and until regulations were enacted; the regulations would have the effect of ousting the Executive Council's *ad hoc* power.

[34] *Carpenter Fishing Corp. v. Canada* (*Minister of Fisheries and Oceans*), [1997] F.C.J. No. 1811 (QL) (F.C.A.) is also relevant to the issue before me. In that case, the Minister of Fisheries and Oceans (MFO) created a formula, which was in the nature of both a policy and a guideline, to govern how fishing licences would be granted by his Department on an individual basis. The Federal Court of Appeal found the MFO's decision to be lawful. The decision made by the MFO is similar to the Minister of Citizenship and Immigration's decision to prioritize certain applications. It was made in response to serious concerns which fell directly under his responsibilities. Hence, the situation in *Carpenter Fishing* and here are comparable. The actions of both Ministers were practical responses informed by the legitimate policy considerations. The legislative schemes under which each Minister acts are complex and involve dynamic issues.

[35] Taken together, *Carpenter Fishing, Capital Cities, and CTV* provide direction in this case. The Minister is responsible for the administration of IRPA. In the absence of enacted regulations, he has the power to set policies governing the management of the flow of immigrants to Canada, so long as those policies and decisions are made in good faith and are consistent with the purpose, objectives, and scheme of IRPA. The Governor in

> Council retains the power to direct how the Minister should administer IRPA through regulations, and may oust the Minister's powers. However, where there is a vacuum of express statutory or regulatory authority, the Minister must be permitted the flexible authority to administer the system. Without the policies and procedures impugned by the Applicants, the system would fail. Parliament could not have intended that the system fail.

[108] While *Vaziri* involved a different statutory regime, in my view the principles are equally applicable in this case.

[109] In conclusion, the Minister had the authority to impose conditions on spectrum licences for the 700 MHz band, including spectrum caps applicable to large wireless service providers such as Telus. Having regard to the Minister's authority in light of the policy objectives of the inter-related statutory scheme comprised of the *RA*, the Regulations, the *TA* and the *DIA*, and applying a textual, contextual and purposive analysis, in my view the subject conditions do not comprise eligibility requirements but serve to further the implementation of clearly articulated telecommunications policy. If there is any aspect of the conditions that affect eligibility, then this is incidental to the Minister's authority to administer spectrum management in accordance with those policy objectives. And, in any event, in the absence of promulgated regulations by the Governor-in-Council pertaining to spectrum licence eligibility, the conditions do not exceed the Minister's authority or conflict with the Governor-in-Council's legislative authority. The Minister correctly and reasonably exercised his authority in this regard.

[110] For those reasons, this application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. this application for judicial review is dismissed with costs payable to the Respondent.; and

2. in the event the parties cannot agree as to the quantum of the costs to be paid to the Respondent, they may file written submissions to the Court within 10 days of the issuance of this decision.

"Cecily Y. Strickland"

Judge

ANNEX

***Radio Communications Act*, RSC, 1985, c R-2**

Interpretation	Définitions
2. In this Act,	2. Les définitions qui suivent s'appliquent à la présente loi.
"radio authorization" means a licence, certificate or authorization issued by the Minister under paragraph 5(1)(a);	« autorisation de radiocommunication » Toute licence ou autorisation et tout certificat visés à l'alinéa 5(1)*a*).
Minister's Powers	ministériels
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,	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) issue	*a*) délivrer et assortir de conditions :
(i) radio licences in respect of radio apparatus,	(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) spectrum licences in respect of the utilization of specified radio frequencies	(i.1) les licences de spectre à l'égard de l'utilisation de fréquences de

within a defined geographic area,	radiocommunication définies dans une zone géographique déterminée, et notamment prévoir les conditions spécifiques relatives aux services pouvant être fournis par leur titulaire,
(ii) ….., and	(ii)…, and
(v) any other authorization relating to radiocommunication that the Minister considers appropriate, 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;	(v) toute autre autorisation relative à la radiocommunication qu'il estime indiquée;
(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;
….	…
(e) plan the allocation and use of the spectrum;	*e*) planifier l'attribution et l'utilisation du spectre;
….	…
(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.

Canadian telecommunications policy

(1.1) In exercising the powers conferred by subsection (1), the Minister may have regard to the objectives of the Canadian telecommunications policy set out in section 7 of the Telecommunications Act.

Politique canadienne de télécommunication

(1.1) Dans l'exercice des pouvoirs prévus au paragraphe (1), le ministre peut aussi tenir compte de la politique canadienne de télécommunication indiquée à l'article 7 de la *Loi sur les télécommunications*.

Bidding system for radio authorizations

(1.2) In exercising the power under paragraph (1)(a) to issue radio authorizations, the Minister may use a system of competitive bidding to select the persons to whom radio authorizations will be issued…..

Adjudication d'autorisations de radiocommunication

(1.2) Dans l'exercice du pouvoir qui lui est conféré par l'alinéa (1)*a*), le ministre peut recourirà un processus d'adjudication pour délivrer des autorisations de radiocommunication.

Procedures for bidding system

(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.

Processus d'adjudication

(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.

POWERS OF GOVERNOR IN COUNCIL AND OTHERS

POUVOIRS DU GOUVERNEUR EN CONSEIL ET AUTRES

Regulations

Règlements

6. (1) The Governor-in-Council may make regulations

(a) respecting technical requirements and technical standards in relation to

(i) radio apparatus,

(ii) interference-causing equipment, and

(iii) radio-sensitive equipment, or any class thereof;

(b) prescribing the eligibility of persons to whom radio authorizations, or any class thereof, may be issued, including eligibility criteria based on

(i) in the case of an individual, citizenship or permanent residence, or

(ii) in the case of a corporation, residence, ownership or control of the corporation, and the citizenship or permanent residence status of the directors and officers of the corporation;

(c) prescribing the qualifications of persons to whom radio authorizations, or any class thereof, may be

6. (1) Le gouverneur en conseil peut, par règlement :

a) 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;

b) définir l'admissibilité à l'attribution d'autorisations de radiocommunication, ou de toute catégorie de celles-ci, notamment les critères d'admissibilité fondés sur :

(i) dans le cas d'une personne physique, la citoyenneté ou la résidence permanente,

(ii) dans le cas d'une personne morale, la résidence, le lien de propriété ou le pouvoir de contrôle, ainsi que le statut de citoyen ou de résident permanent de ses administrateurs et dirigeants;

c) définir les qualités requises pour l'attribution d'autorisations de radiocommunication, ou de

issued, including examinations to be administered;

toute catégorie de celles-ci, notamment l'examen à subir;

(d) prescribing the procedure governing the making of applications for radio authorizations, or any class thereof, including form and manner, and prescribing the processing and disposition of those applications and the issuing of radio authorizations by the Minister;

d) préciser la procédure applicable à la présentation des demandes d'autorisations de radiocommunication, ou de toute catégorie de celles-ci, notamment quant aux modalités de forme, au mode de traitement et au sort de ces demandes, ainsi qu'à la délivrance des autorisations par le ministre;

(e) prescribing the terms and conditions of radio authorizations, including, in the case of a radio licence, terms and conditions as to the services that may be provided by the holder thereof;

e) préciser les conditions des autorisations de radiocommunication et, dans le cas des licences radio, celles qui concernent les services pouvant être fournis par leur titulaire;

(f) prescribing conditions and restrictions applicable in respect of any prescribed radio service;

f) préciser les conditions et les restrictions applicables aux services radio réglementaires;

(g) …

g)…;

(s) prescribing anything that by this Act is to be prescribed; and

s) prendre toute mesure d'ordre réglementaire prévue par la présente loi;

(t) generally for carrying out the purposes and provisions of this Act.

t) prendre toute autre mesure d'application de la présente loi.

Radiocommunication Regulations, SOR/96-484

Eligibility	Admissibilité
9. (1) The following persons are eligible to be issued radio licences as radiocommunication users or radiocommunication service providers other than radiocommunication carriers in all services except the amateur radio service:	9. (1) Pour tous les services sauf le service de radioamateur, sont admissibles à l'attribution d'une licence radio soit à titre d'usager radio, soit à titre de fournisseur de services radio autre qu'un transporteur de radiocommunications :
(a) an individual who is	*a*) la personne physique qui est :
(i) a citizen within the meaning of subsection 2(1) of the Citizenship Act,	(i) soit un citoyen au sens du paragraphe 2(1) de la *Loi sur la citoyenneté*,
(ii) a permanent resident within the meaning of subsection 2(1) of the Immigration Act, or	(ii) soit un résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration*,
(iii) a non-resident who has been issued an employment authorization under the Immigration and Refugee Protection Act;	(iii) soit un non-résident qui a obtenu une autorisation d'emploi sous le régime de la *Loi sur l'immigration et la protection des réfugiés*;
(b) a corporation that is incorporated or continued under the laws of Canada or a province;	*b*) la personne morale qui est constituée ou prorogée sous le régime des lois fédérales ou provinciales;
[…]	[...]
10. (1) ….	10. (1)…..
(2) The following persons or entities are eligible to be issued radio licences as radiocommunication carriers:	(2) Sont admissibles à l'attribution d'une licence radio, à titre de transporteur de radiocommunications :

(a) an individual who is

(i) a citizen within the meaning of subsection 2(1) of the Citizenship Act who is ordinarily resident in Canada, or

(ii) a permanent resident within the meaning of subsection 2(1) of the Immigration Act who is ordinarily resident in Canada, and who has been ordinarily resident in Canada for not more than one year after the date on which that person first became eligible to apply for Canadian citizenship;

(b) a partnership or joint venture where each partner or co-venturer is eligible to be issued a radio licence under this subsection;

(c) a Canadian government, whether federal, provincial or local, or an agency thereof; and

(d) a corporation that is

(i) Canadian-owned and controlled and is incorporated or continued under the laws of Canada or a province, or

(ii) a Canadian carrier that meets the eligibility criteria set out in subsection 16(1) or (2) of the Telecommunications

a) la personne physique qui est :

(i) soit un citoyen au sens du paragraphe 2(1) de la Loi sur la citoyenneté et un résident habituel du Canada,

(ii) soit un résident permanent au sens du paragraphe 2(1) de la Loi sur l'immigration et un résident habituel du Canada depuis une période maximale d'un an à compter de l'expiration de la date où elle est devenue pour la première fois admissible à demander la citoyenneté canadienne;

b) la société de personnes ou la coentreprise dont chaque associé ou coentrepreneur est admissible à l'attribution d'une licence radio en vertu du présent paragraphe;

c) le gouvernement fédéral, un gouvernement provincial ou une administration locale au Canada, ou un organisme de l'un d'eux;

d) la personne morale qui est :

(i) soit constituée ou prorogée sous le régime des lois fédérales ou provinciales et est la propriété de Canadiens et sous contrôle canadien,

(ii) soit une entreprise canadienne qui remplit les conditions d'admissibilité prévues aux paragraphes 16(1)

Act, whether or not the carrier is exempt from the application of that Act or that Act does not otherwise apply to the corporation. Show table of contents	ou (2) de la Loi sur les télécommunications, qu'elle soit ou non exemptée de l'application de cette loi ou autrement soustraite à son application.

***Department of Industry Act*, SC 1995, c 1**

Powers, duties and functions	Pouvoirs et fonctions due ministre
4. (1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to	4. (1) Les pouvoirs et fonctions du ministre s'étendent de façon générale à tous les domaines de compétence du Parlement non attribués de droit à d'autres ministères ou organismes fédéraux et liés :
[…]	[…]
(k) telecommunications, except in relation to (i) the planning and coordination of telecommunication services for departments, boards and agencies of the Government of Canada, and (ii) broadcasting, other than in relation to spectrum management and the technical aspects of broadcasting;	k) aux télécommunications, sauf en ce qui a trait à la planification et à la coordination des services de télécommunication aux ministères et aux organismes fédéraux et à la radiodiffusion — à l'exception de la gestion du spectre et des aspects techniques de la radiodiffusion;
Objectives	Objectifs
5. The Minister shall exercise the powers and perform the duties and functions assigned by subsection 4(1) in a manner	5. Le ministre exerce les pouvoirs et fonctions que lui confère le paragraphe 4(1) de manière à:

that will

(a) strengthen the national economy and promote sustainable development;	a) renforcer l'économie nationale et promouvoir le développement durable;
(b) promote the mobility of goods, services and factors of production and of trade and commerce in Canada;	b) favoriser la circulation des biens, des services et des facteurs de production ainsi que le commerce intérieur;
(c) increase the international competitiveness of Canadian industry, goods and services and assist in the adjustment to changing domestic and international conditions;	c) accroître la compétitivité de l'industrie, des biens et des services canadiens sur le plan international et faciliter l'adaptation aux situations intérieure et internationale;
(d) encourage the fullest and most efficient and effective development and use of science and technology;	d) favoriser le plein essor de la science et de la technologie et encourager leur utilisation optimale;
(e) foster and promote science and technology in Canada;	e) favoriser la science et la technologie au Canada;
(f) strengthen the framework for the development and efficiency of the Canadian marketplace;	f) renforcer la structure nécessaire à l'essor et à l'efficacité du marché canadien;
(g) promote the establishment, development and efficiency of Canadian communications systems and facilities and assist in the adjustment to changing domestic and international conditions;	g) encourager la mise sur pied, le développement et l'efficacité des systèmes et installations de communications du pays et faciliter l'adaptation aux situations intérieure et internationale;
(h) stimulate investment; and	h) stimuler l'investissement;

(i) promote the interests and protection of Canadian consumers

i) promouvoir les intérêts et la protection du consommateur canadien.

Telecommunications Act, SC 1993, c 38

Canadian Telecommunications Policy

Politique canadienne de télécommunication

Objectives

Politique

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

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) 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;

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

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

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

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

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

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

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) to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective;

f) favoriser le libre jeu du marché en ce qui concerne la fourniture de services de télécommunication et assurer l'efficacité de la réglementation, dans le cas où celle-ci est nécessaire;

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

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

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

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

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

Canadian Ownership and Control

Propriété et contrôle canadiens

Definitions

Définitions

16. (1) The following definitions apply in this section.

16. (1) Les définitions qui suivent s'appliquent au présent article.

"entity" « entité »

"entity" means a corporation, partnership, trust or joint venture.

« coentreprise » "joint venture"

« coentreprise » Association d'entités dans le cas où leurs rapports ne constituent pas, en vertu des lois canadiennes, une personne morale, une société de personnes ou une fiducie et si les droits de participation indivise à la propriété des actifs de l'entreprise canadienne ou des intérêts avec droit de vote de l'entreprise canadienne appartiennent ou appartiendront à celles-ci.

"joint venture" « coentreprise »

"joint venture" means an association of two or more entities, if the relationship among those associated entities does not, under the laws in Canada, constitute a corporation, a partnership or a trust and if all the undivided ownership interests in the assets of the Canadian carrier or in the voting interests of the Canadian carrier are or will be owned by all the entities that are so associated.

« entité » "entity"

« entité » Personne morale, société de personnes, fiducie ou coentreprise.

"voting interest" « intérêt avec droit de vote »

« intérêt avec droit de vote » "voting interest"

"voting interest", with respect to

« intérêt avec droit de vote »

(a) a corporation with share capital, means a voting share;

a) Action avec droit de vote d'une personne morale avec capital social;

(b) a corporation without share capital, means an ownership interest in the assets of the corporation that entitles the owner to rights

b) titre de participation d'une personne morale sans capital social qui accorde à son propriétaire des droits semblables à ceux du

similar to those enjoyed by the owner of a voting share; and

(c) a partnership, trust or joint venture, means an ownership interest in the assets of the partnership, trust or joint venture that entitles the owner to receive a share of the profits and to share in the assets on dissolution.

Eligibility

(2) A Canadian carrier is eligible to operate as a telecommunications common carrier if

(a) it is an entity incorporated, organized or continued under the laws of Canada or a province and is Canadian-owned and controlled;

(b) it owns or operates only a transmission facility that is referred to in subsection (5); or

(c) it has annual revenues from the provision of telecommunications services in Canada that represent less than 10% of the total annual revenues, as determined by the Commission, from the provision of telecommunications services in Canada.

propriétaire d'une action avec droit de vote;

c) titre de participation d'une société de personnes, d'une fiducie ou d'une coentreprise qui permet à son propriétaire de recevoir une partie des profits et, en cas de dissolution, une partie des actifs.

Admissibilité

(2) Est admise à agir comme entreprise de télécommunication l'entreprise canadienne, selon le cas :

a) qui est une entité constituée, organisée ou prorogée sous le régime des lois fédérales ou provinciales et qui est la propriété de Canadiens et sous contrôle canadien;

b) qui n'est propriétaire ou exploitante que d'une installation de transmission visée au paragraphe (5);

c) dont les revenus annuels provenant de la fourniture de services de télécommunication au Canada représentent moins de dix pour cent de l'ensemble des revenus pour l'année, déterminé par le Conseil, provenant de la fourniture de ces services au Canada.

Canadian ownership and control

(3) For the purposes of paragraph (2)(a), an entity is Canadian-owned and controlled if

(a) in the case of a corporation, not less than 80% of the members of the board of directors are individual Canadians;

(b) Canadians beneficially own, directly or indirectly, in the aggregate and otherwise than by way of security only, not less than 80% of the entity's voting interests; and

(c) the entity is not otherwise controlled by persons that are not Canadians.

Prohibition

(4) No Canadian carrier shall operate as a telecommunications common carrier unless it is eligible under this section to operate as such.

Exemption

(5) Paragraph (2)(a) and subsection (4) do not apply in respect of the ownership or operation of

Contrôle et propriété canadiens

(3) Pour l'application de l'alinéa (2)a), est la propriété de Canadiens et est contrôlée par ceux-ci l'entité :

a) dans le cas d'une personne morale, dont au moins quatre-vingts pour cent des administrateurs sont des Canadiens;

b) dont au moins quatre-vingts pour cent des intérêts avec droit de vote sont la propriété effective, directe ou indirecte, de Canadiens, à l'exception de ceux qui sont détenus à titre de sûreté uniquement;

c) qui n'est pas par ailleurs contrôlée par des non-Canadiens.

Interdiction

(4) Il est interdit à l'entreprise canadienne d'agir comme entreprise de télécommunication si elle n'y est pas admise aux termes du présent article.

Exclusion

(5) L'alinéa (2)a) et le paragraphe (4) ne s'appliquent pas en ce qui touche la propriété ou

(a) international submarine cables;

(b) earth stations that provide telecommunications services by means of satellites; or

(c) satellites.

Exception

(6) A Canadian carrier that is eligible to operate under paragraph (2)(c) remains eligible to operate even if it has annual revenues from the provision of telecommunications services in Canada that represent 10% or more of the total annual revenues from the provision of telecommunications services in Canada as long as the increase in its annual revenues from the provision of telecommunications services in Canada to 10% or more of the total annual revenues from the provision of telecommunications services in Canada did not result from the acquisition of control of another Canadian carrier or from the acquisition of assets used by another Canadian carrier to provide telecommunications services.

Acquisition

l'exploitation :

a) de câbles sous-marins internationaux;

b) de stations terriennes qui assurent des services de télécommunication par satellites;

c) de satellites.

Exception

(6) L'entreprise canadienne admise à agir comme entreprise de télécommunication au titre de l'alinéa (2)c) demeure ainsi admise même si ses revenus annuels provenant de la fourniture de services de télécommunication au Canada représentent dix pour cent ou plus de l'ensemble des revenus pour l'année provenant de la fourniture de ces services au Canada si l'augmentation de ses revenus annuels provenant de la fourniture de ces services au Canada à dix pour cent ou plus de l'ensemble des revenus pour l'année provenant de la fourniture de ces services au Canada ne découlait pas de l'acquisition du contrôle d'une autre entreprise canadienne ni de l'acquisition d'actifs utilisés par une autre entreprise canadienne pour la fourniture de service de télécommunication.

(7) A Canadian carrier to which subsection (6) applies is not authorized to acquire control of a Canadian carrier or acquire assets used by another Canadian carrier to provide telecommunications services.

Notice

(8) A Canadian carrier that is eligible to operate under paragraph (2)(c) shall notify the Commission when it acquires control of another Canadian carrier or acquires assets used by another Canadian carrier to provide telecommunications services.

Affiliates

(9) For the purposes of determining annual revenues from the provision of telecommunications services in Canada under this section, the annual revenues of a Canadian carrier include the annual revenues from the provision of telecommunications services in Canada of its affiliates as defined in subsection 35(3).

Regulations

Regulations

22. (1) The Governor in Council may, in relation to Canadian carriers' eligibility

Acquisition

(7) L'entreprise canadienne visée au paragraphe (6) ne peut acquérir le contrôle d'une autre entreprise canadienne ni acquérir des actifs utilisés par une autre entreprise canadienne pour la fourniture de service de télécommunication.

Avis

(8) L'entreprise canadienne admise à agir comme entreprise de télécommunication au titre de l'alinéa (2)c) avise le Conseil de l'acquisition du contrôle de toute entreprise canadienne ou de l'acquisition des actifs utilisés par une autre entreprise canadienne pour la fourniture de service de télécommunication.

Affilié

(9) Pour déterminer les revenus annuels provenant de la fourniture de services de télécommunication au Canada pour l'application du présent article, sont également visés les revenus provenant de la fourniture de tels services au Canada par tout affilié — au sens prévu au paragraphe 35(3) — de l'entreprise canadienne.

Règlements

Règlements

under section 16 to operate as telecommunications common carriers, make regulations

22. (1) Le gouverneur en conseil peut prendre des règlements concernant l'admissibilité des entreprises canadiennes prévue à l'article 16. Il peut notamment prendre des règlements :

(a) respecting information that is to be provided, the persons by whom and to whom it is to be provided, the manner in which and the time within which it is to be provided and the consequences of failing to provide it;

a) sur les renseignements à fournir, les personnes par qui et à qui ils doivent être fournis, les modalités de temps ou autres de leur fourniture et les conséquences du défaut de les fournir;

(b) respecting the circumstances and the manner in which a Canadian carrier, in order to maintain its eligibility, may control the acquisition and ownership of its voting shares, restrict, suspend or refuse to recognize ownership rights in respect of those shares and require holders of those shares to dispose of them;

b) sur les circonstances dans lesquelles l'entreprise canadienne peut, pour maintenir son admissibilité, contrôler l'acquisition et la propriété de ses actions avec droit de vote, ainsi que limiter, suspendre ou refuser de reconnaître des droits de propriété à l'égard de celles-ci ou obliger ses actionnaires à en disposer, ainsi que sur les modalités afférentes à la prise de ces mesures;

(c) authorizing the board of directors of a Canadian carrier to pay a dividend or to make any other distribution with respect to voting shares that would otherwise be prohibited because the shares were held in contravention of section 16 or any regulations made under this subsection where, in the board's opinion, the contravention was inadvertent or of a technical nature or it would be otherwise inequitable not to

c) autorisant le conseil d'administration de l'entreprise canadienne à procéder, à l'égard des actions avec droit de vote, à un versement de dividendes ou à toute autre distribution qui seraient par ailleurs interdits en raison de la détention de celles-ci en violation de l'article 16 ou des règlements d'application du

pay the dividend or make the distribution;

présent paragraphe, dans les cas où, selon le Conseil, soit la violation est involontaire ou de nature technique, soit il serait injuste de ne pas procéder au versement ou à la distribution;

(d) respecting the circumstances and the manner in which a Canadian carrier may restrict voting rights attached to shares, or suspend or void the exercise of those rights, in order to maintain its eligibility;

d) sur les circonstances dans lesquelles l'entreprise canadienne peut limiter les droits de vote afférents aux actions — ou suspendre ou annuler leur exercice — pour maintenir son admissibilité, ainsi que sur les modalités afférentes à la prise de ces mesures;

(e) respecting the circumstances and the manner in which a Canadian carrier may
(i) sell, redeem or purchase shares held contrary to section 16 or any regulations made under this subsection, and
(ii) deal with the proceeds of sale and reimburse any purchasers of the shares in good faith;

e) sur les circonstances dans lesquelles l'entreprise canadienne peut vendre ou racheter les actions détenues en violation de l'article 16 ou des règlements d'application du présent paragraphe, disposer du produit de la vente et rembourser les acheteurs de bonne foi, ainsi que sur les modalités afférentes à la prise de ces mesures;

(f) respecting the powers of a Canadian carrier to require disclosure of the beneficial ownership of its shares, the right of the carrier and its directors, officers and employees, and its agents or mandataries, to rely on any required disclosure and the effects of their reliance;

f) sur les pouvoirs de l'entreprise canadienne lui permettant d'exiger la divulgation de l'identité des véritables propriétaires de ses actions, sur le droit de l'entreprise et de ses administrateurs, dirigeants, employés et mandataires de se fier à cette divulgation, ainsi que sur les effets qui peuvent en résulter;

(g) respecting the verification

by the Commission of a Canadian carrier's eligibility, the measures the Commission may take to maintain the carrier's eligibility, including exercising the powers of the carrier's board of directors and countermanding its decisions, and the circumstances and manner in which the Commission may take those measures;

(h) respecting the circumstances and manner in which the Commission and its members, officers or employees, or its agents or mandataries, or a Canadian carrier and its directors, officers and employees, and its agents or mandataries, may be protected from liability for actions taken by them in order to maintain the carrier's eligibility;

(i) defining the words "successor" and "Canadian" for the purposes of section 16; and

(j) prescribing anything that is to be prescribed and generally for carrying out the purposes and provisions of section 16 and this subsection.

Idem

(2) The Governor in Council may, in relation to

g) sur la vérification par le Conseil de l'admissibilité de l'entreprise canadienne, ainsi que sur les mesures que celui-ci peut prendre pour maintenir cette admissibilité, notamment l'exercice des pouvoirs du conseil d'administration de l'entreprise et l'annulation des décisions de celui-ci, ainsi que sur les circonstances justifiant la prise de ces mesures et les modalités afférentes à celle-ci;

h) sur les circonstances dans lesquelles le Conseil et ses conseillers, dirigeants, employés ou mandataires ou l'entreprise canadienne et ses administrateurs, dirigeants, employés ou mandataires peuvent être exemptés de toute responsabilité pour les mesures qu'ils ont prises afin de maintenir l'admissibilité de l'entreprise, ainsi que sur les modalités afférentes à l'octroi de cette exemption;

i) en vue de définir les termes « ayant droit » et « Canadiens » pour l'application de l'article 16;

j) en vue de prendre toute mesure d'ordre réglementaire et, d'une façon générale, toute mesure d'application de l'article 16 et du présent paragraphe.

Idem

international submarine cable licences, make regulations

(a) prescribing the procedure governing applications for licences, including the form of applications, the information to accompany them and the manner of filing, processing and disposing of them;

(b) respecting the form of licences and the information they must include and requiring licensees to publish or otherwise make them available for public inspection;

(c) prescribing classes of international submarine cable licences and determining the persons eligible to hold licences of any particular class;

(d) prescribing fees, or the manner of calculating fees, in respect of licences and prescribing the manner in which the fees are to be paid; and

(e) generally for carrying out the purposes and provisions of sections 17 to 20.

Liability for fees

(3) Fees required to be paid under this Part constitute a debt due to Her Majesty in right of Canada and may be recovered in a court of

(2) Le gouverneur en conseil peut, par règlement relatif aux licences de câble sous-marin international :

a) préciser les renseignements devant accompagner les demandes de licence et la procédure applicable à la présentation de celles-ci — notamment quant à leurs modalités de forme, à leur mode de traitement et à leur sort;

b) régir la forme des licences ainsi que les renseignements devant y figurer, et exiger de leur titulaire, leur publication ou leur mise à la disposition du public;

c) établir les catégories de licences de câble sous-marin international et déterminer les personnes pouvant être titulaires de telles licences;

d) fixer le montant des droits à acquitter pour les licences — ou le mode de leur calcul — ainsi que les modalités de leur paiement;

e) prendre toute autre mesure nécessaire pour l'application des articles 17 à 20.

Créances de Sa Majesté

(3) Les droits payables dans le cadre de la présente partie constituent une créance de Sa Majesté du chef du Canada,

competent jurisdiction.

Publication of proposed regulations

(4) Any regulations proposed to be made under this section shall be published in the Canada Gazette at least sixty days before their proposed effective date, and a reasonable opportunity shall be given to interested persons to make representations to the Minister with respect to the proposed regulations.

Idem

(5) Proposed regulations that are modified after publication need not be published again under subsection (4).

dont le recouvrement peut être poursuivi à ce titre devant tout tribunal compétent.

Publication des projets de règlement

(4) Les projets de règlement visés au présent article sont publiés dans la Gazette du Canada au moins soixante jours avant la date prévue pour leur entrée en vigueur, les intéressés se voyant accorder la possibilité de présenter au ministre leurs observations à cet égard.

Idem

(5) Une seule publication suffit, que le projet ait ou non été modifié.

FEDERAL COURT

SOLICITORS OF RECORD

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