CITATION: *Quadrangle v. Attorney General of Canada*, 2025 ONSC 4526
COURT FILE NO.: CV-15-00010824-00CL
DATE: 20250806

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:	)	
	)	
QUADRANGLE GROUP LLC, QCP CW S.a.r.l. and OBELYSK MEDIA INC.	)	*Jonathan Lisus, Matthew Law, Vivien E. Milat and Philip Underwood*, for Quadrangle Group LLC and QCP CW S.a.r.l., Plaintiffs
Plaintiffs	)	
	)	*Ken Rosenberg, Kris Borg-Olivier, Danielle Glatt and Douglas Montgomery*, for Obelysk Inc., Plaintiff
– **and** –	)	
	)	
ATTORNEY GENERAL OF CANADA	)	*J. Sanderson Graham, Jacqueline Dais-Visca, Derek Rasmussen, Sanam Goudarzi and Leah Bowes*, for the Attorney General of Canada, Defendant
	)	
Defendant	)	
	)	
	)	

REASONS FOR JUDGMENT

OSBORNE J.

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OVERVIEW

1. The Plaintiffs were shareholders in Mobilicity, one of the new entrants in the Canadian cellular telephone market in 2008. The Government of Canada controls access to the wireless spectrum. Historically, the Government issued licences to applicants for a relatively nominal fee. These licences grant access to defined bands within the wireless spectrum.

2. In 2008, recognizing the value of these licences to market participants, the Government ran an auction in which bidders could purchase licences for various bands within the spectrum. The auction generated significant interest from incumbents in the Canadian wireless communications business: Rogers, Bell, and TELUS. The federal Government, however, was openly and actively trying to attract new entrants into the field. For that reason, the auction included certain bands in the spectrum that were set-aside for licences available only to new entrants and not to the incumbents.

3. The spectrum auction was astonishingly successful in achieving both financial results and policy objectives. The 2008 spectrum auction yielded over $4.2 billion for the federal Government, dramatically exceeding the Government's most optimistic projections. The auction also garnered significant interest from potential new entrants.

4. One of those new entrants, Mobilicity, was the successful bidder for several licences. The Plaintiffs capitalized Mobilicity and paid the Government $243 million for numerous spectrum licences.

5. The spectrum licences shared common characteristics and terms (described as attributes). They were valid for 10 years. The set-aside licences, such as those issued to Mobilicity, could not be transferred to an incumbent for a period of five years. The Government's objective was to avoid the participation of speculators who might bid on licences with a view to selling them shortly after their issuance, thereby thwarting the policy objective of attracting sustainable new entrants.

6. At its core, this action is about the transferability of spectrum licences. But significantly, it is also about the extraordinary and unusual conduct of Government officials with respect to the Mobilicity spectrum licences in particular.

7. The Plaintiffs submit that when deciding to bid in the first place, they and their investors relied upon the representation that they had the ability to transfer the Mobilicity licences to an incumbent after the five-year moratorium. They argue that the transferability provided an exit strategy to be used in the event Mobilicity was unsuccessful, in the form of a sale to the only likely buyers: the incumbents. However, in 2013, that transferability was removed. As it turned out, Mobilicity struggled financially and ultimately sought protection from its creditors in an insolvency proceeding.

8. The Plaintiffs submit that when Mobilicity sought to transfer its licences after the five-year period, the Government intentionally acted to unlawfully frustrate that sale. The Government unilaterally changed the rules by amending the policy framework to

prohibit a transfer of the licences to an incumbent; it then directly interfered with Mobilicity's sales process to favour a competitor; and intentionally stalled its consideration of an application to transfer the licences; and finally, it interfered in a bidding war between incumbents when they were finally permitted to acquire the spectrum licences.

9. The Plaintiffs seek the return of their investment and lost profits.

10. The Government maintains that it did nothing unlawful. Rather, the Government submits that it was, and is, entitled and obligated to act in the public interest and that this obligation means that the Government has the discretion to change policies at any time, and to do so without any liability. Moreover, the Government submits that it does not follow from the fact that the licences granted to Mobilicity prohibited the transfer to an incumbent within five years, that the licences thereby permitted such a transfer after that five-year period.

11. Finally, the Government submits that Mobilicity failed because of its own financial and operational challenges, not as the result of any act or omission on the part of the Government. As such, neither Mobilicity (who was the licence holder), nor the Plaintiffs (who were shareholders and lenders) ought to be entitled to any relief.

12. That is really the nub of this complex proceeding: did the Government induce parties to invest hundreds of millions of dollars in the Canadian cellular telephone market based on representations and promises of an available exit strategy, only to "pull the rug out" from underneath those parties when they tried and failed to compete in a market dominated by three well-funded incumbents?

13. For the reasons that follow, the action is allowed.

THE PARTIES

14. The Plaintiffs created and indirectly invested in the company known as "Mobilicity". Until Rogers Communications Inc. ("Rogers") acquired the company in June, 2015, Mobilicity carried on business as a wireless telecommunications service provider in Canada.

15. The Plaintiffs were, directly or indirectly, at all material times the principal shareholders in Data & Audio-Visual Enterprises Investments Inc., ("DAVE").

16. DAVE was, in turn, one of two principal shareholders in Data & Audio-Visual Enterprises Holdings Inc. ("DAVE Holdings"), incorporated in March, 2008. DAVE Holdings carried on no active business operations, but was the sole shareholder of its subsidiary, Data & Audio-Visual Enterprises Wireless Inc. That entity, Canadian-

controlled and incorporated on March 6, 2008, operated under the business name "Mobilicity" from February 2, 2010, until Rogers acquired it in 2015.[1]

17. On October 1, 2016, DAVE and DAVE Holdings amalgamated with Obelysk Media Inc. ("Obelysk"), and thereafter ceased operations as independent entities. The amalgamated corporation, Obelysk, continues and is one of the Plaintiffs in this action.[2] The principal and ultimate majority owner of DAVE was Canadian businessman John Bitove ("Bitove").

18. The other two Plaintiffs are QCP CW S.a.r.l. and Quadrangle Group LLC (collectively, "Quadrangle"). QCP CW S.a.r.l. is established under the laws of Luxembourg. It is one of several investment entities managed by Quadrangle Group LLC, a New York-based private investment firm with an emphasis on the information and communications technology and services sector.

19. Ultimately, shareholder investments into Mobilicity were very material. DAVE invested CAD $33.3 million, and Quadrangle Group LLC oversaw the investment of CAD $217 million in equity and $95 million in debt by QCP CW S.a.r.l.

20. The Defendant, the Attorney General of Canada (the "Government"), defends this action on behalf of His Majesty the King in Right of Canada, who is, pursuant to ss. 3, 10 and 23 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, vicariously liable for torts committed by His servants, when acting in their official capacities, in good faith and within the scope of their employment.

THE EVIDENCE

21. This trial was lengthy and complex. Certain evidence was admitted and filed jointly, both as to authenticity and for the truth of its contents. The factors set out by the Court of Appeal in *Girao v. Cunningham*, 2020 ONCA 260, 2 C.C.L.I. (6th) 15 were considered as reflected in the record. That evidence includes the following:

    - Joint Chronology of Key Events;
    - Cast of Characters describing the name and position of each of the key individuals involved in relevant events;
    - Joint Brief of Admitted Regulatory Policies, Requests and Decisions (two volumes); and
    - Joint Brief of Documents as indexed.

[1] Rogers retired the Mobilicity name the following year, in 2016.
[2] It follows from the amalgamation that DAVE and DAVE Holdings continue, as amalgamated, under the name Obelysk.

22. In addition, the parties filed Requests to Admit and Responses to Requests to Admit as well as Briefs of Read-Ins from examinations for discovery. At my direction, the Read-In Briefs were reviewed by opposite parties, such that context and content were agreed prior to them being filed, with the exception of certain evidence described below.

23. During trial, issues arose with respect to the admissibility of certain evidence, resulting in mid-trial rulings as follows:

    a. regarding the assertion of solicitor-client privilege over nine documents (or portions thereof) produced by the Defendant: Endorsement dated December 16, 2023. See: *Quadrangle v. AG Canada*, 2023 ONSC 7125 and Oral Reasons dated January 10, 2024 and reported at *Quadrangle v. AG Canada*, 2024 ONSC 164; and

    b. regarding proposed read-in evidence tendered by the Defendant after the witnesses who had given the evidence proposed to be read-in had testified at trial and re: the Rule in *Browne v. Dunn*. See: Endorsement dated January 9, 2024, *Quadrangle v. AG Canada* 2024 ONSC 7371.

24. In addition to the voluminous documentary evidence filed, the evidence at trial included the testimony of ten fact witnesses and five expert witnesses. Each expert was properly qualified to give opinion evidence in her or his field of expertise, as reflected in the record.

25. There are numerous factual issues requiring determination. Making those determinations requires me, in part, to assess the credibility and reliability of witnesses who gave evidence at trial.

26. Credibility and reliability are different. Credibility has to do with the honesty, sincerity, or veracity of a witness. Reliability describes the other factors that can influence the accuracy of testimony, such as the witness's ability to observe, recall, and recount events in issue: *Metro Ontario Real Estate Ltd. v. Hillmond Investments Ltd.*, 2024 ONSC 2625, at para. 34.[3] As observed by Centa J. in that case:

> [35] Witnesses can sincerely believe their evidence is true, but that does not mean that what they are saying is reliable. Memory is fallible and becomes increasingly frail over time. Even an apparently convincing, confident, and credible witness may not be an accurate or reliable reporter. There is significant risk in placing too much emphasis on demeanour or the confidence with which a witness speaks where there are contradictions and inconsistencies inherent in their evidence or where that testimony is inconsistent with contemporaneous records: *Sanichar*, at para.

[3] Citing *R. v. C. (H.)*, 2009 ONCA 56, 244 O.A.C. 288, at para. 41; *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at para. 33; *R. v. Sanichar*, 2012 ONCA 117, 288 O.A.C. 164, at para. 36, *per* Blair J.A., and at paras. 69 and 70, *per* Laskin J.A. (dissenting, but not on this point), rev'd, 2013 SCC 4, [2013] 1 S.C.R. 54; *Fitzpatrick v. Orwin*, 2012 ONSC 3492, at paras. 62-68.

35; *R. v. McGrath*, [2000] O.J. No. 5735 (S.C.), at paras. 10-14; *R. v. Stewart* (1994), 1994 CanLII 7208 (ON CA), 18 O.R. (3d) 509 (C.A.), at pp. 515-18; *R. v. Norman* (1993), 1993 CanLII 3387 (ON CA), 16 O.R. (3d) 295 (C.A.), at pp. 311-15.

[36] One of the leading decisions on assessing credibility is *Faryna v. Chorny*, where the court explained that:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions: 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.), at para. 10; *Phillips et al. v. Ford Motor Co. of Canada Ltd. et al*., 1971 CanLII 389 (ON CA), [1971] 2 O.R. 637 (C.A.).

[37] Taking into account my assessment of reliability and credibility, I will assess the evidence before me according to many factors including:

a. if the evidence makes sense by being internally consistent, logical or plausible;

b. if there are inconsistencies or weaknesses in the evidence of the witness such as internal inconsistencies, prior inconsistent statements, or inconsistencies with the evidence of other witnesses;

c. if there is independent evidence to confirm or contradict the witness' evidence, or a lack of such evidence;

d. the witness' demeanour, including their sincerity and use of language, although this must be considered with caution; and

e. if the witness, particularly one that is a party in a case, may have a motive to fabricate.

See: *Caroti v. Vuletic*, 2022 ONSC 4695, at para. 438; *1088558 Ontario Inc. v. Musial*, 2022 ONSC 5239, at para. 83.

27. Where findings of credibility and reliability are necessary, I have stated those findings below in the relevant section(s) where the evidence of that witness is discussed.

28. Finally, and while the decision in this matter was under reserve, counsel made further submissions with respect to a decision of this Court that the Plaintiffs submitted was relevant to the issues requiring determination in this matter. That decision is discussed further below.

Statutory and Regulatory Framework for the Wireless Spectrum in Canada

29. Of central relevance to this action is the statutory and regulatory framework:

    a. as it existed at the time of the 2008 auction in which Mobilicity successfully bid for its spectrum licences; and

    b. when it was amended in 2013 particularly to articulate new criteria relevant to the consideration of requests for licence transfers.

30. The wireless spectrum is a limited natural resource. It is used to provide a broad range of communications services by both the public and private sectors. The spectrum is divided into different bands, each with its own properties:

    a. low-band spectrum consisting of large radio waves that travel long distances and have good penetration but have limited capacity to carry information;

    b. mid-band spectrum that includes medium-size waves that travel medium distances with a limited ability to penetrate buildings, but which have greater capacity to carry more information; and

    c. high-band spectrum that offers high speeds and an increased capacity to carry information, but only over short distances.[4]

31. Public uses include defence, national security, scientific, and public safety applications. Private and commercial uses include cellular telephone services used widely across Canada.

32. To accommodate these different uses, the different bands are allocated to specific purposes, such as broadcasting, cellular telephones, satellite transmission, public safety, and two-way radio.

33. All of Canada's wireless telecommunications service providers require access to the spectrum bands and particularly those bands dedicated to commercial purposes,

[4] Examination-in-Chief of Fiona Gilfillan, December 11, 2023, Transcript, at pp. 1942-1943.

including the Advanced Wireless Service ("AWS") band. AWS is used for mobile services including voice, data, and messaging.

The Relevant Statutory Provisions

34. The Minister of Industry (the "Minister") manages the radio frequency spectrum (or wireless spectrum, as it is commonly referred to) in Canada pursuant to authority granted by the *Department of Industry Act*, S.C. 1995, c. 1, the *Radiocommunication Act*, R.S.C. 1985, c. R-2, the *Telecommunications Act*, S.C. 1983, c. 38, and applicable regulations.

35. In discharging that authority, the Minister presides over the Department of Industry ("Industry Canada"), a Department of the Government of Canada.[5]

36. The *Department of Industry Act* provides that the Minister's powers, duties, and functions 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, among other things, industry and technology in Canada and telecommunications (s. 4).

37. The objectives of the *Department of Industry Act* include strengthening the national economy, increasing the international competitiveness of Canadian industry, and the promotion of the establishment, development and efficiency of Canadian communications systems and facilities (s. 5).

38. The Minister has the authority under the *Department of Industry Act* to fix fees in respect of products, rights and privileges provided by the Minister, the Department or any board or agency of the Government for which the Minister has responsibility (s. 19).

39. The Minister is also given the power under the *Radiocommunication Act* to issue spectrum licences in respect of the utilization of specified radio frequencies within a defined geographic area (s. 5(1)(a)(1.1)), and may fix the terms and conditions of any such licence; plan the allocation and use of the spectrum (s. 5(1)(e)). The Minister, in exercising the powers conferred by s. 5(1), may have regard to the objectives of the Canadian telecommunications policy set out in s. 7 of the *Telecommunications Act*.

40. Those include the objectives of facilitating 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, to enhance the efficiency and competitiveness of Canadian telecommunications, and to foster increased reliance on

[5] Unless otherwise stated, references to "Industry Canada" include those Crown servants working within the scope of their employment for the Department of Industry.

market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective (s.7).

Auctions for Spectrum Licences

41. Telecommunications companies in Canada began developing wireless infrastructure for cellular mobile telephone networks in and around 1984. Industry Canada implemented licencing processes and issued licences for the use of the wireless spectrum to those companies. Several companies entered into infrastructure sharing and other agreements to provide assistance or increased services and capabilities to one another, beginning in and around 2001.

42. Initially, wireless service providers in Canada such as Rogers, Clearnet, and Microcell obtained radio licences through a comparative licensing process run by Industry Canada. They paid annual fees for those licences. Later, those radio licences were converted to spectrum licences.

43. However, as the Government recognized the significant value that spectrum licences could represent, it began conducting open bidding procedures (or auctions) for spectrum licences.

44. Such auctions for spectrum licences have been authorized since June 1996 when the *Radiocommunication Act* was amended to provide in s. 5(1.2) that the Minister may use a system of competitive bidding to select the persons to whom radio authorizations will be issued. As described in the 2001 Framework (discussed below), "auctions … provide a means for Canadian taxpayers to be compensated for the use of this public resource [the spectrum]".[6]

45. Where the Minister accepts a bid for radio authorization under a system of competitive bidding (i.e., an auction), any monies payable to Her Majesty pursuant to the bid are in lieu of any fees fixed under that or any other Act for the radio authorization (s. 5(1.3)).

46. Pursuant to s. 5(2), the Minister may suspend or revoke a radio authorization with the consent of the holder, or after giving written notice to the holder and giving the holder a reasonable opportunity to make representations to the Minister with respect thereto, where the Minister is satisfied that (i) the holder has contravened the Act, the regulations or the terms or conditions of the radio authorization, or (ii) the radio authorization was obtained through misrepresentation.

47. The Radiocommunication Regulations, SOR/96-484, made under the *Radiocommunication Act* provide in relevant part that the assignment of a frequency or frequencies to a holder of a radio authorization does not confer a monopoly on the use of the frequency or frequencies, nor shall a radio authorization be construed as

[6] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 6, Framework for Spectrum Auctions in Canada, October 2001, s. 1 Introduction.

conferring any right of continuing tenure in respect of the frequency or frequencies (s. 40).

The 2001 Framework for Spectrum Auctions

48. In October 2001, Industry Canada published the second edition of the *Framework for Spectrum Auctions in Canada* (the "*2001 Framework*"). The *2001 Framework* provided in relevant part in respect of spectrum auctions that:

    - licencees would be allowed to transfer their licences in whole or in part (in both bandwidth and geographic dimensions) to eligible third parties;

    - licences would be assigned for an initial 10-year term, with a high expectation of renewal for subsequent tenure terms; and

    - the Government would continue to possess all sovereign rights necessary to implement any required reallocation at any time…. Any reallocation would only take place after full consultation.[7]

49. The *2001 Framework* further provided that:

    - Licence Attributes needed to be well-defined so as to enhance the ability of bidders and subsequently licencees to develop business plans, secure adequate financing, develop bidding strategies, and to invest in their networks;[8]

    - a spectrum licence issued via an auction will generally be valid for 10 years with a high expectation of renewal for a further 10 year term unless a breach of a licence condition has occurred, a fundamental reallocation of spectrum to a new service is required, or an overriding policy need arises.[9] A public consultation regarding the renewal of the licence will commence not later than two years prior to the end of the licence term if the Department foresees the possibility that it will not renew this licence, or if renewal fees are contemplated; and

    - the licencee may transfer its licence(s) in whole or in part to a qualified recipient.[10]

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[7] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 6, Framework for Spectrum Auctions in Canada, October 2001, Framework Summary.
[8] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 6, Framework for Spectrum Auctions in Canada, October 2001, s. 4 Licence Attributes.
[9] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 6, Framework for Spectrum Auctions in Canada, October 2001, s. 4.5 Licence Term.
[10] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 6, Framework for Spectrum Auctions in Canada, October 2001, s. 4.6 Licence Transferability and Divisibility.

The 2007 Policy Framework

50. By 2005, the three major wireless service providers in Canada were Bell, Rogers, and TELUS (the "Incumbents"), who together controlled approximately 94% of the market. Following the Incumbents' acquisition of Clearnet and Microcell (two smaller providers), Industry Canada initiated a review of the Canadian wireless industry that same year.

51. The Telecommunications Policy Review Panel delivered its final report to the Minister of Industry in March 2006. On February 16, 2007, Industry Canada sought input on the issues through publication of *The Consultation on a Framework to Auction Spectrum in the 2 GHz Range, Including Advanced Wireless Services*.

52. Ultimately, that policy review resulted in the *Spectrum Policy Framework for Canada* issued on June 13, 2007 (the "*2007 Framework*"). The *2007 Framework* was generally consistent with the *2001 Framework* and was in effect at the time of the 2008 AWS Spectrum Auction relevant to this action.

53. The *2007 Framework* stated the following, in relevant part:

- the new Framework is a timely updating and modernization of the existing document that communicates the underlying principles which the Department and the Minister will rely upon in exercising their authority under the *Radiocommunication Act*;[11]

- the Department is adopting the following policy objective: to maximize the economic and social benefits that Canadians derived from the use of the radio frequency spectrum resource;[12]

- in developing these revised guidelines, the Department recognizes, as did many other administrations, the importance of relying on market forces and spectrum management, to the maximum extent feasible. This includes aspects such as the removal of barriers to secondary markets for spectrum authorizations;[13] and

- this decision to rely, to a greater extent, on market forces must be tempered by the continued need for the management of the resource. However, regulation, where required, should be minimally intrusive, transparent,

[11] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 11, 2007 Spectrum Policy Framework for Canada, June 2007, Intent.
[12] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 11, 2007 Spectrum Policy Framework for Canada, June 2007, s. 4.3 Policy Objective.
[13] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 11, 2007 Spectrum Policy Framework for Canada, June 2007, s. 4.4 Enabling Guidelines, Discussion.

efficient, and effective. Public consultation will continue to be used to solicit input on planned changes to the Program.[14]

54. The Department additionally adopted the following enabling guidelines:

- market forces should be relied upon to the maximum extent feasible;
- regulatory measures, where required, should be minimally intrusive, efficient and effective;
- regulation should be open, transparent, and reasoned, and developed through public consultation, where appropriate; and
- spectrum policy and management should support the efficient functioning of markets by:
    - facilitating secondary markets for spectrum authorizations; and
    - clearly defining the obligations and privileges conveyed in spectrum authorizations.[15]

The 2007 Client Procedures Circular ("CPC")

55. In September 2007, Industry Canada released its Client Procedures Circular for Spectrum Management and Telecommunications: *Licensing Procedure for Spectrum Licences for Terrestrial Services, CPC-2-1-23 Issue 2* (the "*2007 CPC-2-1-23*"). Client Procedures Circulars describe the procedures or processes to be followed by the public when dealing with Industry Canada. The *2007 CPC-2-1-23* Preface stated that the circulars have no status in law.

56. It provided in relevant part, as follows:

a. at the end of the licence term, licencees will normally have their licences renewed at the end of the term unless a breach of a licence condition has occurred, a fundamental reallocation of spectrum to a new service is required, or an overriding policy need arises…. It is important to note that the Minister, pursuant to this regulation, would reallocate spectrum only under certain circumstances, taking into consideration that licencees have complied with the conditions of licence, made large investments in infrastructure, and are serving an established client base. If a reallocation were contemplated, it would take place only after a public consultation…. It should be noted that the spectrum licences subject to relevant provisions in the *Radiocommunication Act* and the *Radiocommunication Regulations*. For example, the Minister continues to have

[14] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 11, 2007 Spectrum Policy Framework for Canada, June 2007, s. 4.4 Enabling Guidelines, Discussion.
[15] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 11, 2007 Spectrum Policy Framework for Canada, June 2007, s. 4.4 Enabling Guidelines.

the power to amend the terms and conditions of spectrum licences…. Such powers would be exercised on an exceptional basis, and only after consultation;[16] and

b. spectrum licences assigned under the different licensing processes may not have the same privileges. One such privilege is that of enhanced transferability and divisibility rights accorded to spectrum licences assigned through an auction. The spectrum licences may be transferred in whole or in part (either in geographic area or in bandwidth) to a third party, subject to the conditions stated on the licence and other applicable regulatory requirements;[17] and

c. the transfer of a spectrum licence will in general be subject to the following conditions and guidelines:

    i. all eligibility criteria and other conditions that apply to a licence will continue, as applicable, when the licence is transferred;

    ii. the party to whom the licence will be transferred (the transferee) must meet the applicable eligibility criteria outlined in the *Radiocommunication Regulations*;

    iii. the transferee will only receive a licence term equal to that remaining on the original licence but will be eligible for the same licence renewal provisions granted to the original licencee;

    iv. all proposed licence transfers must comply with existing policies;

    v. licences will be divisible in the geographic dimensions; however, the minimum geographic size of the new divisions may be one spectrum grid cell or a portion of a census dissemination area; and

    vi. the Department will under certain circumstances allow for the disaggregation and divisibility of spectrum licences.[18]

57. Moreover, written notification to the Department is required for all proposed licence transfers, including a declaration from all interested parties that the points above (i.e., compliance with the eligibility criteria and other conditions of licence) have been satisfactorily addressed.[19]

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[16] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 13, 2007 CPC-2-1-23, s. 5.3 Licence Renewal.
[17] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 13, 2007 CPC-2-1-23, s. 5.6 Transfer and Divisibility of Spectrum Licences.
[18] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 13, 2007 CPC-2-1-23, s. 5.6 Transfer and Divisibility of Spectrum Licences.
[19] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 13, 2007 CPC-2-1-23, s. 5.6 Transfer and Divisibility of Spectrum Licences.

The 2007 AWS Auction Policy Framework

58. In November 2007, Industry Canada issued its *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range* ("*2007 AWS Auction Policy Framework*"), which set out its policy decisions on the key elements of the policy framework for the auction for spectrum licences in the 2 GHz range, including AWS.[20]

59. The *2007 AWS Auction Policy Framework* reflected public consultation and further consideration of spectrum management by Industry Canada. It stated that Industry Canada would undertake a supplementary public consultation on specific changes to the conditions of licence for current licencees to implement the policy measures announced in this document. It further provided that:

    - the policy decisions contained in this paper are final. The auction framework document will be issued before the end of 2007, and will elaborate auction application procedures, [etc.] … In making this announcement now, the department's intention is to provide as much clarity and certainty as possible for potential participants in the auction in a timely manner. The department intends to move quickly to ensure there are no delays in the auction, which is expected to be held in the first half of 2008;[21]

    - the department is committed to government policies which seek to rely on market forces to the maximum extent feasible for the provision of telecommunication services to Canadians. This policy approach can only be pursued in an environment where market forces can be expected to deliver, now and in the future, a level of competition sufficient to protect the interests of users;[22]

    - the current wireless market includes a mix of national, regional and local providers. Three national network operators that are integrated with wireline telecommunications carriers account for 94% of the national wireless market. A contributing factor in this market distribution was the acquisition of wireless-only new entrants by integrated carriers.

    - in considering the wireless market in Canada, the Telecom Panel expressed the view that: "The smaller number of mobile providers in Canada - and the fact that all three national wireless service providers are also owned by large telecommunications service providers that also provide wireline services- naming that there is less competition in the Canadian wireless market than in the U.S. market, which consequently has resulted in higher prices, less

[20] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 14, 2007 AWS Auction Policy Framework, Introduction.
[21] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 14, 2007 AWS Auction Policy Framework, Introduction.
[22] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 14, 2007 AWS Auction Policy Framework, Considerations.

innovation, lower uptake and lower rates of usage." … The Panel went on to recommend "continued use of regulatory mechanisms such as spectrum caps (aggregation limits) where spectrum is scarce in order to provide an opportunity for new entrants to acquire spectrum and for Canadians to have an expanded choice of service providers.";[23]

- in taking the measures outlined in this paper, Industry Canada recognizes that it can guarantee neither new entry nor success of eventual new entrants. The measures being taken are intended to ensure an opportunity for entry by addressing the potential to exploit spectrum as an entry barrier;[24]

- the spectrum would be divided into "frequency blocks" using the same basic block structure as used in the U.S. to facilitate cross-border service;[25]

- 40 MHz of AWS spectrum would be set aside for new entrants only in frequency blocks B, C and D, to account for the need for new entry in all regions of Canada while considering the interests of incumbent operators in their current spectrum holdings;[26]

- to be eligible for the "set-aside", a new entrant was defined as an entity, including affiliates and associated entities, which holds less than 10% of the national wireless market based on revenue;[27]

- for spectrum auctions, Industry Canada divided Canada into geographic service areas called "tiers" based on the geographic areas of the Statistics Canada 1996 Census sub-divisions:

    - Tier 1 was a single national service area;

    - Tier 2 consisted of eight provincial and six large regional service areas;

    - Tier 3 consisted of 59 regional service areas; and

    - Tier 4 comprised 172 localized service areas;

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[23] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 14, 2007 AWS Auction Policy Framework, Considerations.
[24] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 14, 2007 AWS Auction Policy Framework, Considerations.
[25] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 14, 2007 AWS Auction Policy Framework, Frequency Blocks.
[26] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 14, 2007 AWS Auction Policy Framework, Spectrum Set-Aside.
[27] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 14, 2007 AWS Auction Policy Framework, Spectrum Set-Aside.

- as to the set-aside AWS spectrum, Spectrum blocks B and C included Tier 2 licences, and spectrum block D included Tier 3 licences;[28]

- the AWS licences would be issued for a 10-year term similar to other spectrum licences. AWS licence renewal was to be subject to a public consultation process initiated in year eight…. The nature and details of this process will be developed through a separate consultation to be initiated by the department in the context of the *Framework for Spectrum Auctions in Canada*. The renewal process, which will form the basis of the follow-up consultation, will include consideration of:

    - the extent of geographic coverage across the licenced area;

    - whether there is interest in the licence from other parties;

    - whether licence fee should apply for a subsequent licence term; and

    - whether renewal in whole or in part, supports the orderly development of radio communication in light of the policy objectives of the *Telecommunications Act* given known future factors, pressures and the spectrum environment;[29]

- while the nature and details of the renewal process were to be developed through separate consultation initiated by Industry Canada, all licence transfers must be approved by the Minister, and licences obtained through the set-aside may not be transferred to companies that do not meet the criteria of a new entrant for a period of five years from the date of issuance;[30] and

- Section 5(1)(*b*) of the *Radiocommunication Act* gives the Minister the power to amend any existing condition of licence. Industry Canada will undertake a public consultation on the conditions of licence being proposed. This consultation will be confined to the implementation of the policy measures announced earlier in this document.[31]

60. The November *2007 AWS Auction Policy Framework* foreshadowed the December 22, 2007 publication of the *Licensing Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range*. This document

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[28] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 14, 2007 AWS Auction Policy Framework, Geographic Tiers.
[29] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 14, 2007 AWS Auction Policy Framework, Roll-out Obligations, Licence Term and Renewal.
[30] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 14, 2007 AWS Auction Policy Framework, Spectrum Set-aside.
[31] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 14, 2007 AWS Auction Policy Framework, Conditions of Licence.

was consistent with the *2007 AWS Auction Policy Framework* described above and provided that:

- AWS licences would be issued for a 10-year term;
- licence renewals would be subject to a public consultation process initiated in year eight;
- the renewal process, which will form the basis of the follow-up consultation, would include consideration of:
    - the extent of geographic coverage across the licenced area;
    - whether there is interest in the licence from other parties;
    - whether licence fees should apply for a subsequent licence term; and
    - whether renewal in whole or in part supports the orderly development of radio communications in light of the policy objectives of the *Telecommunications Act* given known future factors, pressures and the spectrum environment.
- beyond consideration of the above factors, other reasons for non or partial renewal may include:
    - a fundamental reallocation of spectrum to a new service required;
    - an overriding policy need or spectrum management concern arises;
    - national security, treaty or other international obligations or requirements;
    - a breach of licence condition;
    - the spectrum has not been deployed were not sufficiently deployed over the licenced area;
    - whether there is interest from others for access to the spectrum and
    - other relevant factors which might be raised in the public consultation;[32]

[32] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 15, Licensing Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range, s. 4.1, Licence Term.

61. Notably, licence transferability and divisibility was specifically provided for, and these licence features were again consistent with both earlier framework documents in key respects:

    - licences acquired through the set-aside may not be transferred or leased to, divided among, or exchanged with companies that do not meet the criteria of a new entrant, for a period of five years from the date of issuance;[33]

    - departmental approval is required for each proposed transfer of a licence…. The licencee must apply to the Department in writing. The transferee(s) must also provide an attestation and other supporting documentation demonstrating that it meets the eligibility criteria and all other conditions, technical or otherwise, of the licence;[34] and

    - the licensing process is conducted in accordance with the *2001 Framework.* Licencees should also familiarize themselves with *CPC 2-1-23*.[35]

62. The document also provided mechanical and procedural particulars and details related to the proposed auction.

63. The consultation process that was contemplated then occurred. The Department of Industry solicited questions for clarification with respect to the AWS Policy and Licensing frameworks. On February 27, 2008, it published the *Responses to Questions for Clarification on the AWS Policy and Licensing Frameworks,* and this document was described as serving as a companion document to the other documents (described above) for the auction.

64. Among the relevant Questions and Responses were these:

    - 1.12: In response to questions seeking clarification about applicability of rules of the *2007 Framework*, including whether a fee may apply at the end of the 10 year licence term: In general, the rule specified in the Framework for Spectrum Auctions in Canada still apply to spectrum licences that will be awarded through the AWS auction, including that: "A public consultation regarding the renewal of the licence will commence no later than two years prior to the end of the licence term. If the Department foresees the possibility that it will not renew this licence, or if renewal fees are contemplated." Consistent with the approach outlined in the AWS Policy Framework,

[33] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 15, Licensing Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range, s. 4.2 Licence Transferability and Divisibility.
[34] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 15, Licensing Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range, s. 4.2 Licence Transferability and Divisibility.
[35] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 15, Licensing Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range, s. 5 Licensing Process.

licence renewal will be subject to a public consultation to be initiated in year eight;[36] and

- 5.8: In response to questions seeking clarification of licence term, roll-out obligations and renewal of licence: The AWS licences will be issued for a 10-year term similar to other spectrum licences. At a minimum of two years before the end of this term, and any subsequent terms, the licencee may apply for licence renewal for an additional licence term of up to 10 years. AWS licence renewal will be subject to a public consultation process initiated in year eight. That public consultation will take into consideration the extent of geographic coverage across the licenced area, among other factors specified in the AWS Policy Framework. Were conditions of licence have been met and the licencee can demonstrate geographic coverage, which is at a minimum, consistent with the rollout targets set out in Annex 2 to the AWS Policy Framework, the AWS licences will have *a high expectation of renewal*.[37] [Emphasis in original].

The 2008 AWS Spectrum Auction

65. The proposed auction (the "AWS Spectrum Auction") was for 90 MHz of spectrum in two 45 MHz blocks. Mobilicity applied to participate in the AWS Spectrum Auction and submitted its beneficial ownership information disclosing its shareholders, (i.e., the Plaintiffs) as required, on March 10, 2008.

66. The AWS Spectrum Auction began on May 27, 2008. Market interest was extremely high. In fact, when it ended, and Industry Canada released the results on July 21, 2008, the results wildly exceeded Industry Canada's expectations, and raised in the aggregate almost $4.3 billion for the Government. Of the $4.3 billion, in excess of $1.6 billion came from new entrant companies alone.

67. The AWS Spectrum Auction provisionally awarded Mobilicity ten 10 MHz spectrum licences in the "set-aside" C and D spectrum blocks covering Vancouver, Calgary, Edmonton, Toronto (Southern Ontario), Ottawa/Gatineau ("Eastern Ontario and Outaouasis") and other areas, for the aggregate licence fee of $243,159,000.[38]

68. The award was provisional since Mobilicity was required to go through Industry Canada's ownership and control review process before the licences were issued.

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[36] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 16, Responses to Questions for Clarification on the AWS Policy and Licensing Frameworks, 1.12.
[37] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 16, Responses to Questions for Clarification on the AWS Policy and Licensing Frameworks, 5.8.
[38] The division of the spectrum into "blocks" followed the same basic block structure is used in the United States. Each block represented a defined MHz range within the spectrum. For example, the "set-aside" spectrum blocks B, C and D were as follows: B – 1720 to 1730 MHz; C – 1730 to 1735 MHz; and D – 1735 to 1740 MHz.

69. To fund the payment of that licence fee and capitalize Mobilicity to the extent of $250 million, DAVE invested $33,301,410[39] and QCP CW S.a.r.l. invested $216,698,600[40] in equity in DAVE Holdings, the parent company of Mobilicity. QCP CW S.a.r.l. and Quadrangle subsequently advanced additional funds by way of debt.[41] So too did other lenders.[42]

70. Industry Canada completed a review and assessment of Mobilicity's shareholders' agreement, required the parties to amend the agreement to clarify that final control would be in the hands of Canadian residents, and then issued the spectrum licences to Mobilicity.

The Mobilicity Licences

71. The Mobilicity Licences, effective February 11, 2009[43] (the "Mobilicity Licences"), were issued under cover of correspondence dated February 17, 2009 from Industry Canada to Bitove as Chairman and CEO of Mobilicity.

72. The Mobilicity Licences were similar to one another and to other licences issued to successful bidders in the AWS Spectrum Auction in terms of form and content and authorized "the utilization of the specified radio frequencies in the [defined service area]".[44]

73. The Mobilicity Licences included various Licence Conditions as set out in the Appendices to each licence. Those Licence Conditions were identical in each Mobilicity Licence. Those sufficiently relevant to be set out in full include the following:

    - 1. Licence Term. This licence is issued for a 10-year term. The process for issuing licences after this term, and any issues relating to renewal will be determined by the Minister of Industry following a public consultation;

    - 2. Licence Transferability and Divisibility. The licencee may apply in writing to transfer its licence in whole or in part (divisibility), in both the bandwidth and geographic dimensions. Departmental approval is required

[39] $6,660,282 on August 1, 2008 and an additional $26,641,128 on September 2, 2008: Joint Basic Chronology of the Parties.
[40] $43,339,720 on August 1, 2008 and an additional $173,358,880 on September 2, 2008: Joint Basic Chronology of the Parties.
[41] QCP CW S.a.r.l. and Quadrangle subsequently advanced additional funds to DAVE Holdings by way of debt: QCP CW S.a.r.l. advanced $19 million by way of *pari passu* notes on January 26, 2011; Quadrangle advanced $59.7 million by way of unsecured convertible debentures on April 29, 2011; Quadrangle advanced $59.7 million in unsecured convertible debentures (the "Pari Passu Notes") on April 29, 2011; QCP CW S.a.r.l. advanced $20 million by way of subordinated notes on September 4, 2012; and QCP CW S.a.r.l. advanced $15 million by way of subordinated notes on October 12, 2012: Joint Basic Chronology of the Parties.
[42] Mobilicity issued First Lien Notes in accordance with the First Lien Indenture dated April 29, 2011 due April 29, 2018; and issued $95 million worth of unsecured debentures (the "Senior Notes") to Equity Financial: Joint Basic Chronology of the Parties.
[43] The spectrum licences were effective February 11, 2009 but were issued one week later on February 17, 2009.
[44] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 17, Mobilicity's Spectrum Licences, p. 1.

for each proposed transfer of a licence, whether the transfer is in whole or in part. The transferee(s) must also provide an attestation and other supporting documentation demonstrating that it meets the eligibility criteria and all other conditions, technical or otherwise, of the licence.

…

Licences acquired through the set-aside of spectrum … may not be transferred or leased to, acquired by means of a change in ownership or control of the licencee, divided among, or exchanged with companies that do not meet the criteria of a new entrant, for a period of five years from the date of issuance….

For more information, refer to Industry Canada's *Client Procedures Circular CPC-2-1-23, Licensing Procedure for Spectrum Licences for Terrestrial Services*, as amended from time to time; and

- 16. Amendments. The Minister of Industry retains the discretion to amend these terms and conditions of licence at any time.[45]

The 2013 Consultation

74. The regulatory landscape was relatively quiet after the 2008 AWS Spectrum Auction for approximately five years (i.e., the period during which licencees like Mobilicity were prohibited from transferring their licences to anyone other than a new entrant). However, as the expiry of that moratorium approached and as other events (as described below) relevant to Mobilicity transpired, Industry Canada contemplated and then implemented material changes, particularly to the conditions relating to licence transfers.

75. On March 7, 2013, Industry Canada released its *Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences* (the "2013 Consultation"). That document sought to "elaborate and seek views on the approach used by Industry Canada, which will be applied with respect to all spectrum licences, when considering licencees' requests to transfer or divide a spectrum licence, or enter into a subordinate licensing arrangement."[46]

[45] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 17, Mobilicity's Spectrum Licences, Appendices.

[46] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 18, Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences, s. 1 Intent, at para. 1.

76. The 2013 Consultation stated that Industry Canada proposed to revise the *2007 CPC 2-1-23* "in order to indicate the specific criteria considered and process used when spectrum licence transfer applications are reviewed."[47]

77. This represented the first time that any document purported to set out specific criteria relevant to licence transfer applications or expressly stated that Industry Canada was proposing to consider any criteria other than related to the eligibility of a proposed transferee.

78. It stated that Industry Canada proposed, upon receipt of a spectrum licence transfer request, to determine whether a detailed review was required, considering the amount of spectrum involved in the transfer and/or changes in levels of spectrum concentration and distribution among licencees in the region that would result from the transfer.[48]

79. Where required, a detailed review would determine whether approval of the spectrum licence transfer request would impact:

    - the efficiency and competitiveness of the Canadian telecommunications market;

    - the availability, quality or affordability of services available to consumers; and/or

    - the economic and social benefits that Canadians derive from the use of the radio frequency spectrum resource.[49]

80. In making this determination, the 2013 Consultation further provided that Industry Canada may examine the following factors (all of which were new):

    - current licence holdings of the proposed licencee or subordinate licencee in the subject spectrum band and region;

    - overall distribution of licences in the subject spectrum band and/or related bands in the region;

    - the current and/or prospective services provided using the subject spectrum; and/or

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[47] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 18, Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences, s. 6 Review of Spectrum Licence Transfer Requests, at para. 13.

[48] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 18, Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences, s. 6 Review of Spectrum Licence Transfer Requests, at para. 15.

[49] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 18, Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences, s. 6 Review of Spectrum Licence Transfer Requests, at para. 16.

- the existence and availability of alternative spectrum with similar properties as that subject to the transaction.[50]

81. Finally, the 2013 Consultation proposed (in relevant part) that, under normal circumstances, Industry Canada would approve the issuance of a new licence, provided that the request met the applicable requirements set out in the *2007 CPC-2-1-23* or advise the parties that a detailed review would be required, within four weeks of receipt of the transfer request.

82. Where a detailed review was required, the Department would approve the issuance of a new licence if the requirements were met or communicate the factors leading to a refusal to approve the spectrum licence transfer request and the reasons for same, within 16 weeks.[51]

83. Industry Canada formally requested comments on these criteria and considerations.

84. The market reaction to the proposals described in the 2013 Consultation was swift and vigourous.

85. Mobilicity strongly opposed the changes and the newly articulated criteria for consideration of licence transfer requests not previously set out.

86. Mobilicity submitted that the very announcement of the consultation with respect to licence transferability had already further impaired access to capital for new entrants and created a level of uncertainty and confusion in the minds of investors as to the liquidity of spectrum assets.[52]

The 2013 Transfer Framework

87. On June 28, 2013, following the receipt of comments, Industry Canada issued the *Framework Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences for Commercial Mobile Spectrum* (the "*2013 Transfer Framework*").

88. In relevant part, the *2013 Transfer Framework* implemented the new criteria described above, and provided that, in making its determination as to the impact of a licence transfer on the policy objectives of the Framework, Industry Canada would analyze, among other factors, the change in spectrum concentration levels (i.e., the amount of

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[50] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 18, Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences, s. 6 Review of Spectrum Licence Transfer Requests, at para. 17.

[51] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 18, Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences, s. 7 Timelines, at paras. 21-23.

[52] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 19, Consultation on Considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licenses, Written Submissions of Data & Audio-Visual Enterprises Wireless Inc., dba Mobilicity, Submissions of Mobilicity, at para. 8.

spectrum controlled by the Applicants, in comparison to that held by all licencees) that would result from the licence transfer.[53]

89. In each case, Industry Canada would examine the ability of the Applicants and other existing and future competitors to provide services, given the post-transfer concentration of commercial mobile spectrum in the affected Licence area(s)[54].

90. As part of the determination described above, Industry Canada would normally consider the following factors:

- the current licence holdings of the Applicants and their Affiliates in the licenced area;
- the overall distribution of licence holdings in the licenced spectrum band and commercial mobile spectrum bands in the licenced area;
- the current and/or prospective services to be provided and the technologies available using the licenced spectrum band;
- the availability of alternative spectrum that has similar properties to the licenced spectrum band;
- the relative utility (e.g., above and below 1 GHz) and substitutability of the licenced spectrum, and other commercial mobile spectrum bands in the licenced area;
- the degree to which the Applicants and their Affiliates have deployed networks and the capacity of those networks;
- the characteristics of the region, including urban/rural status, population levels and density, or other factors that impact spectrum capacity or congestion; and
- any other factors relevant to the policy objectives outlined in this Framework that may arise from the Licence Transfer.[55]

[53] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 22, Framework Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences for Commercial Mobile Spectrum, s. 2.3 Considerations and Criteria, at para. 39.
[54] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 22, Framework Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences for Commercial Mobile Spectrum, s. 2.3 Considerations and Criteria, at para. 39.
[55] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 22, Framework Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences for Commercial Mobile Spectrum, s. 2.3 Considerations and Criteria, at para. 40.

91. Finally, the *2013 Transfer Framework* provided that reviews of transfer requests would normally be completed within 12 weeks from receipt.[56]

The 2013 CPC

92. Shortly thereafter, in August 2013, Industry Canada released corresponding amendments to the *2007 CPC-2-1-23* in the form of *CPC-2-1-23, Issue 3* (the "*2013 CPC-2-1-23*"). It was consistent with, and complementary to, the new *2013 Transfer Framework*, both generally and specifically with respect to applications for licence transfers.

93. Section 5.6 addressed the transfer of spectrum licences and noted the enhanced transferability and divisibility rights accorded to spectrum licences. Industry Canada continued to state that "[t]he Minister has the authority to consider any and all matters deemed relevant to the request for a transfer, and to grant the transfer as requested, to fix additional terms and conditions, or to refuse the transfer."[57]

94. The *2013 CPC-2-1-23* repeated the same factors set out above in the *2013 Transfer Framework* that Industry Canada would take into account when considering a licence transfer application.[58]

95. Finally, s. 5.7 provided that a licencee could return the spectrum licence to Industry Canada, upon which the Department would make the associated spectrum available to the public in a timely manner. Industry Canada would publicly announce the availability of the spectrum, call for expressions of interest and then determine the appropriate subsequent licensing mechanism (i.e., a first-come, first-served process or a competitive licensing process).[59]

THE CLAIMS

96. As stated at the outset of these Reasons, the Plaintiffs allege in this action that they were induced by misrepresentation to invest in Mobilicity and participate in the 2008 AWS Spectrum Auction to purchase the Mobilicity Licences. They further allege that they were then the targets of unlawful actions in and around 2013 until 2015 related to the implementation of amendments to the transferability terms of their licences, and other

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[56] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 22, Framework Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences for Commercial Mobile Spectrum, s. 2.7 Timelines, at para. 94.

[57] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 23, Licensing Procedure for Spectrum Licences for Terrestrial Services, CPC-2-1-23, Issue 3, s. 5.6 Transfer or Division of Spectrum Licences and Subordinate Licensing Arrangements.

[58] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 23, Licensing Procedure for Spectrum Licences for Terrestrial Services, CPC-2-1-23, Issue 3, s. 5.6.4.2, Criteria and Considerations.

[59] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 23, Licensing Procedure for Spectrum Licences for Terrestrial Services, CPC-2-1-23, Issue 3, s. 5.7, Returned Spectrum Licences.

unlawful acts by the Government, by which the Government interfered in the efforts of Mobilicity to transfer its licences.

97. The Plaintiffs' claims as advanced at trial are set out in the Second Fresh as Amended Statement of Claim dated June 29, 2022 (the "Claim").[60] The Plaintiffs advance the following causes of action, each of which they claim supports an award of damages:

    a. negligence;

    b. negligent and/or reckless misrepresentation;

    c. breach of contract;

    d. intentional interference with economic relations; and

    e. unjust enrichment.

98. The position of the Defendant is set out in the Fresh as Further Amended Statement of Defence dated July 8, 2022. The Defendant denies liability under any of the pleaded causes of action and pleads that neither of the Plaintiffs have suffered any actionable loss, with the result that there are no damages even if liability were established.

99. Finally, the parties disagree on the appropriate quantum of damages in the event that any of the causes of action are made out.

100. I will consider each cause of action in turn.

Negligence

101. The starting point for both negligence and negligent representation is the same: did Industry Canada owe the Plaintiffs a duty of care?

102. If the answer to that question is yes, I must consider whether that duty of care was breached by the events underlying the allegations:

    a. first, allegations of misrepresentations inducing the Plaintiffs to participate in the 2008 AWS Spectrum Auction and bid for the Mobilicity licences in the first place in 2006 - 2008 and then implementing the 2013 Transfer Framework thereby removing the ability to transfer the spectrum licences; and

    b. second, allegations of interference in the efforts of the Plaintiffs to sell the spectrum licences in and around 2014 and 2015 deliberately preventing Mobilicity from achieving maximum value for its business (e.g., negligence).

[60] Second Fresh as Amended Statement of Claim dated June 29, 2022, at para. 1.

Was a Private Law Duty of Care owed to the Plaintiffs?

103. Public authorities, including an agency of the federal Crown, can be liable for negligence (including negligent misrepresentation) on the same basis as private actors: *Gauthier v. Canada (Attorney General)*, (2000), 225 N.B.R. (2d) 211, 185 D.L.R. (4th) 660, at para. 17. See also *Paddy-Cannon v. Canada (Attorney General),* 2025 ONCA 394 and *Knisley v. Canada (Attorney General),* 2025 ONCA 185.[61]

104. A regulator is subject to a "duty of care … to ensure that its regulatory actions [do] not unreasonably or unnecessarily harm [the plaintiff's] business interests: *Aylmer Meat Packers Inc. v. Ontario*, 2022 ONCA 579, 162 O.R. (3d) 532 (C.A.) ("*Aylmer*"), at para. 54.

105. In *Aylmer*, the Court of Appeal considered liability in circumstances where officials from the Ontario Ministry of Agriculture, Food and Rural Affairs took control of an abattoir. When the Ministry ultimately returned control to the owners 19 months later, the business was destroyed. The abattoir and the land beneath it were sold to pay outstanding municipal taxes, and the plaintiff brought an action against Ontario in negligence, trespass, and conversion.

106. In that case, a confidential informant had advised the Ministry that the plant was unlawfully processing, for human consumption, sick and disabled animals, in addition to other unlawful activity. The Ministry conducted covert surveillance for several months and ultimately informed the Canadian Food Inspection Agency of certain unlawful conduct resulting in a meat recall.

107. The abattoir ceased doing business the day of that recall. The Ministry occupied the plant and continued to do so for the following 19 months. Subsequent criminal charges against the company and some of its principals resulted in guilty pleas to charges of selling meat that had not been inspected, and to charges of selling meat in bags bearing an unauthorized federal meat inspection legend. All other charges were withdrawn.

108. On appeal, Aylmer argued that the Ministry owed a duty to act reasonably in exercising its regulatory responsibilities in suspending the abattoir licence, occupying its plant, and in storing and destroying the detained meat.

109. The Court of Appeal held that in order to ground a private law duty of care in negligence when the actions of public bodies adversely affect the private interests of regulated entities, three elements are necessary:

    a. the harm complained of must have been reasonably foreseeable;

[61] While the Court of Appeal allowed the appeal in that case on an issue of class definition, the court was clear that negligence could be properly asserted as a cause of action against the federal Crown.

b. there must have been sufficient proximity between the plaintiff and the governmental defendant, such that it would be fair and just to impose a duty of care on the defendant; and

c. there must be no residual policy reasons for declining to impose such a duty.

See *Aylmer*, at para. 22, citing *Cooper v. Hobart,* 2001 SCC 79, [2001] 3 S.C.R. 537; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562; *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643; *Syl Apps Secure Treatment Centre v. D. (B.)*, 2007 SCC 38, [2007] 3 S.C.R. 83. See, also *Anns v. Merton London Borough Council*, [1978] A.C. 728 and *Kamloops (City) v. Nielsen*, 1984 CanLII 21 (SCC), [1984] 2 S.C.R. 2 (the analysis reflected in these cases is often referred to as the "*Anns/Coope*r analysis").

110. The second and third elements above comprise the two-stage *Anns/Cooper* analysis: *Aylmer*, at para. 22.

111. The analysis related to a duty of care applies equally to cases of pure economic loss (economic loss that is unconnected to a physical or mental injury to the plaintiff's person, or to physical damage to property): *1688782 Ontario Inc. v. Maple Leaf Foods Inc*., 2020 SCC 35, [2020] 3 SCR 504, at para. 17, citing *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860, at para. 34; *D'Amato v. Badger*, 1996 CanLII 166 (SCC), [1996] 2 S.C.R. 1071, at para. 13; *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at para. 23.

112. The Supreme Court outlined three categories of pure economic loss incurred between private parties as:

a. negligent misrepresentation or performance of a service;

b. negligent supply of shoddy goods or structures; and

c. relational economic loss.

113. See *Maple Leaf*, at para. 21. However, the invocation of a category, by itself, offers no substitute for the necessary examination that must take place "of the particular relationship at issue in each case" between the plaintiff and the defendant: *Maple Leaf*, at para. 22, citing *Deloitte & Touche v. Livent Inc. (Receiver of),* 2017 SCC 63, [2017] 2 S.C.R. 855, at para. 28; see also *Dorset Yacht Co. v. Home Office*, [1970] A.C. 1004 (H.L.), at p. 1038). Rather, what matters is whether the parties were at the time of the loss in a sufficiently proximate relationship. One of the ways to determine sufficient proximity to ground a duty of care is through a full *Anns/Cooper* analysis: *Maple Leaf*, at para. 22.

114. Accordingly, I will consider first whether the harm complained of here was reasonably foreseeable, and then I will consider the two-stage *Anns/Cooper* analysis.

Was the Harm Reasonably Foreseeable?

115. As stated above, the harm complained of here relates to different conduct or events, at different points in time:

a. the 2006 – 2008 representations of spectrum licence transferability followed by the implementation of the *2013 Transfer Framework*, resulting in the inability of Mobilicity to sell its spectrum licences to entities that were not new entrants (i.e., the Incumbents) after the five-year moratorium expired;

b. the 2014 statements by the Minister of Industry and the manufactured Globe & Mail article (discussed below) intended to specifically interfere with the sale of Mobilicity licences; and

c. 2015 interference in the sale of Mobilicity in the context of the bidding war within the *CCAA* Proceeding.

116. The question is whether the harm that occurred was the reasonably foreseeable consequence of the defendant's act: *Cooper*, at para. 30.

117. I will consider each of the three different sets of allegations.

118. With respect to the representations that the spectrum licences could be transferred to an Incumbent after five years, followed by the implementation of the *2013 Transfer Framework*, in my view, it was reasonably foreseeable – and in fact, was foreseen by the Defendant, that acting to prohibit and prevent the transfer of the Mobilicity spectrum licences to an Incumbent even after the expiry of the five-year restriction would cause harm to the economic interests of the Plaintiffs.

119. I find the following:

a. Industry Canada strongly desired to bring about an increase in competition in Canada's wireless market and to do so, specifically wanted and intended to encourage and incentivize new entrants to compete with the incumbents;[62]

b. Industry Canada recognized both the very significant capital requirements necessary to enter this market and the high risk of failure; and

c. Industry Canada recognized that the new entrants would require external debt and/or equity financing, and as a result would require certainty as to licence

[62] See, for example, the 2006 Final Report of the Telecommunications Policy Review Panel, which identified the small number of mobile providers and the fact that the three incumbent wireless service providers were owned by large telecommunications service providers, as the cause of higher wireless prices, less innovation, lower uptake and lower rates of usage, such that Canada should develop a more efficient and vibrant wireless industry: Exhibit 1, p. 1.

attributes to satisfy the due diligence concerns of such investors and incentivize them to commit the necessary capital.

120. Government witnesses admitted all these factors. For example, Peter Hill, ("Hill"), Senior Director, Spectrum Management Operations, testified about the importance of investors knowing the attributes of a licence, particularly in order to secure adequate financing. He agreed that transferability was a very important attribute:

> Q. And folks need to understand exactly what those attributes are before they start bidding, right?
>
> A. Yes.
>
> Q. Okay. And as to that point, the Framework says:
>
> Understanding exactly what is being auctioned will be very important for bidders to secure adequate financing and to develop a bidding strategy. Right?
>
> A. Yes.
>
> Q. And part of securing adequate financing is to, exactly as it suggests, go out to financiers, investors and lenders, and say we are bidding on a licence in an auction, these are the attributes of the licence, and we would like to participate, right? That's securing financing?
>
> A. Yes, I mean the attributes are somewhat very technical. Sometimes, and –
>
> Q. But –
>
> A. - The geographic coverage in the exact frequency blocks and the other conditions of licence that are imposed, but, yes, I agree.
>
> Q. And but in addition to those attributes, licence terms is an attribute, right?
>
> A. Absolutely.
>
> Q. Very important one?
>
> A. I agree.
>
> Q. Transferability is a very important attribute?

A. I would agree.[63]

121. Kelly Gillis, ("Gillis"), Assistant Deputy Minister, Spectrum Information, Technologies and Telecommunications, testified about the effect of certainty and transferability on investment valuations:

> Q. And what your group is identifying or proposing to tell Mr. Stewart is with respect to issue three, being the five-year restriction on licence transfers to incumbents, whether it should be extended, there are significant legal risks of extending the current transfer restriction years after the AWS auction was conducted based on these rules, right?
>
> A. Yes.
>
> Q. And the view was the risk of challenge is very high and the risk of losing at court is very real, right?
>
> A. Correct. And as we know, it was challenged by Telus.
>
> Q. Yes. And apart from the potential challenge as an issue, there was a secondary issue, an additional issue more precise to say, that a change could discourage companies from participating in the 700 or 2500 MHz auctions due to what they would point to as the capricious actions of Industry Canada, right?
>
> A. Yes, that's what it says, yes.
>
> Q. And your concern in saying that was that if the government changed the rules regarding the transfer of licences acquired at auction, subsequent companies and investors would be reluctant to participate in auctions as a means of acquiring licences, right?
>
> A. As a means to acquire spectrum, yes.
>
> Q. Okay. And the reason you were identifying that risk is because you understood that companies and investors bid or value spectrum licences on an assumption of transferability in the event that licensee fails, right?
>
> A. I think certainty of regulatory process is important for investment.

[63] Cross-Examination of Peter Hill, December 13, 2023, Transcript, pp. 2515-2516.

Q. Right. And what you are telling me when you say that, ma'am, I think we can agree is investors, licensees count on certainty to make valuation decisions and investment decisions, fair?

A. Yes.[64]

…

Q. Right. And the concern is again changing the rules regarding spectrum transfer could discourage participation in auction, auctions, correct?
A. Yes.

Q. And it could also create difficulties with financing, right?

A. It could.

Q. Because investors or lenders aren't going to invest or lend unless they know that the assets of the company can be realized upon in the case of debt or sold in the case of investment, right?

A. Investments make the decisions are -- that would be one of the considerations.

Q. Okay. And you go on to say: Since it would be unknown what the sale rules would be on this multi-hundred million dollar asset being purchased. Right? Do you see that?

A. I'm just trying to find the sentence.

Q. Second last sentence.

A. Yes.

Q. And when we take that sentence together with the prior one about conditions of exit, what you are really saying is investors capitalize companies, bid on licences with an expectation of transferability and they are bidding hundreds of millions of dollars, right?

A. Yes.

Q. And the transferability is an important factor in the valuation and the bids at auction, right?

[64] Cross-Examination of Kelly Gillis, December 20, 2023, at pp. 3382-3383.

A. It's -- yes.[65]

122. In her testimony, Fiona Gilfillan ("Gilfillan"), Director, Spectrum Information, Technologies, and Telecommunications, confirmed that the transferability of licences was an important question that arose in preparation for the 2008 AWS Spectrum Auction:

> Q. Let me understand what you're telling me.
>
> You and I can agree, ma'am, that the process is designed to allow people who want to participate in the auction and bid for and acquire a licence to get clarity from Canada about the attributes of the licences they're going to bid for. The process is designed to permit that, right?
>
> A. Yes.
>
> Q. Okay. And one of the key attributes that auction participants want to understand is transferability, right?
>
> A. Well, if we only received one question from one entity who didn't participate in the auction, I'm not sure how key it was at the time.
>
> It became a very key question absolutely.
>
> …
>
> Q. Okay. So I hope I don't have to go through all of the policy framework, the licensing framework, the consultation. But can we agree in those documents that you reviewed, some of which you talked about with my friend, transferability of licences is an important issue?
>
> A. Transferability of licences is an important issue….[66]

123. Kevin McSweeney ("McSweeney"), Senior Vice-President for CI Global Asset Management ("CI") testified about his knowledge and understanding of licence transferability. He, on behalf of CI, was undertaking due diligence before investing in Mobilicity and called Hill in this regard. They had two such telephone calls.

124. Such calls are routinely recorded at CI, as a financial services firm. McSweeney's recollection, refreshed with the transcripts of the calls, was clear. McSweeney gave evidence regarding his first telephone call to Hill on February 10,

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[65] Cross-Examination of Kelly Gillis, December 20, 2023, at pp. 3387-3388.
[66] Cross-Examination of Fiona Gilfillan, December 12, 2023, at pp. 2108-2111.

2011. McSweeney disclosed to Hill the fact that CI was considering investing in Mobilicity on that call.

125. McSweeney testified that the purpose of the call was to evaluate, from the perspective of an investor doing due diligence (i.e., by calling Hill), the transferability of the licences which in turn directly affected the ability to borrow against them. Put differently, McSweeney wanted to be satisfied that the licences were assets that could be pledged as security for debt or equity investment.

126. Hill and McSweeney had a second telephone call the very next day on February 11, 2011, in which McSweeney sought further clarification about the discretion of the Minister to which all licences were subject. Hill confirmed that while there were references to the discretion of the "Minister", it was "really him and his ADM [Assistant Deputy Minister]" who managed spectrum and licence transfers. McSweeney sought to confirm that there were no other conditions beyond eligibility. Hill described a proposed licence transfer this way: "probably it's a slam dunk you're going to get the licence transferred."[67]

127. There was a significant exchange at trial about the relevance and import of these two calls. McSweeney was challenged in cross-examination and the suggestion was put to him that Hill did not understand the purpose for the telephone calls, and specifically, did not understand that McSweeney was seeking clarification and confirmation about the transferability of spectrum (i.e., the licences) after five years. McSweeney maintained his evidence on this point, and I accept his evidence in this regard.

128. In my view, having listened to his evidence refreshed by the transcripts of these two calls, the suggestion that Hill did not understand what he was being asked, or why McSweeney was asking, is wholly unsupported on the record.

129. Hill, the civil servant in charge of spectrum policy and licence transfers, received the calls from McSweeney. Hill knew McSweeney was with CI. Hill knew that CI was considering an investment in Mobilicity. Hill knew that CI was calling him to independently verify the value proposition represented by the spectrum licences, which in turn depended on their transferability to an Incumbent after five years:

> MR. HILL: But I mean that's -- that's the scoop. If -- if there is a bankruptcy -- using licenses for collateral is fine, but it comes with risk, okay. The risk is is that if it ever went to bankruptcy or whatever --
>
> MR. MCSWEENEY: Yeah.
>
> MR. HILL: -- you know it is a -- the license is issued with a ministerial discretion.

[67] Exhibit 24, Court-Certified Transcript of Audio Recording's in EX.23, at p. 4.

MR. MCSWEENEY: Yeah.

MR. HILL: And to transfer a license because you want to -- you're pulling on it, right, because they're not paying their bills --

MR. MCSWEENEY: Yeah.

MR. HILL: -- whether they're bankrupt or not --

MR. MCSWEENEY: Yeah.

MR. HILL: -- it's the same process, you have to then come to the Minister and explain what's going on.

MR. MCSWEENEY: Yeah.

MR. HILL: And we almost have to probably get the agreement of that other party. And then the Minister has the discretion, and I'm saying, "the Minister," it's -- it's really us, people generally.

MR. MCSWEENEY: I -- I -- I used to send stuff to Governor in Council at Finance, so yeah.

MR. HILL: So --

MR. MCSWEENEY: It's you and your ADM (ph), right?

MR. HILL: Basically.

MR. MCSWEENEY: Yeah.

MR. HILL: And the Minister -- let -- let's say if you wanted to take over that licence and you know seamlessly abide by all the conditions of licence, and you're an eligible person who can hold that licence --

MR. MCSWEENEY: Yes.

MR. HILL: -- then probably it's a slam dunk you're going to get the licence transferred.[68]

130. During the telephone calls, McSweeney specifically asked about conditions of licence and in particular, the transferability condition providing that "spectrum cannot be acquired by one of the three large incumbents ... for five years".[69] I reject the suggestion that Hill did not understand what he was being asked or why. At no time did

[68] Exhibit 24, Court-Certified Transcript of Audio Recording's in EX.23, at pp. 2-4.
[69] Exhibit 24, Court-Certified Transcript of Audio Recording's in EX.23, at p. 9.

Hill state or suggest anything to the effect that the licences could have further transferability restrictions even after the five-year moratorium.

131. In his examination-in-chief, McSweeney underscored the significant role that licence transferability to an Incumbent played when deciding whether to finance the Mobilicity bid (which CI did, as a lender):

> Q: … What did you understand Mr. Hill to be telling you there about the transferability of licences to incumbents after the five year restriction expired?
>
> A. That it needed to continue to be operated to provide cellular service to, you know, Canadians in line with the conditions of the licence.
>
> Q. And if it was?
>
> A. That was very reassuring to me as an investor.
>
> …
>
> Q. Do you recall the context of this discussion that three pure plays had been looking for financing approaching -- had approached you?
>
> A. Yes.
>
> Q. And what was the context?
>
> A. It was better to understand, you know, whether any of them were financeable. So at the time and, again, it may be repetitive to this court but I'll say it for comprehensiveness. But Wind had, Wind which had acquired set-aside spectrum, had looked for financing and through that process we were contacted. Public Mobile which acquired set-aside spectrum which was a little bit different had looked to raise financing through which we were contacted. And Mobilicity, the other pure play that acquired set-aside spectrum had obviously given this transcript, was looking for financing. Each of those investment cases, for each of those investment cases, spectrum transferability would have been a relevant consideration.
>
> Q. What significance was the information given to you by Mr. Hill in the decision to advance funds to Mobilicity?
>
> A. It was confirmatory of, you know, what I had been told. It was reassuring on collateral or transferability basis. And there's always a mosaic of things that makes one want to invest in a

> certain investment. But it certainly would have been -- it was a significant positive attribute in our decision to advance funds to Mobilicity.[70]

132. Industry Canada acknowledged the very same issue, stating: "[p]olicies reducing liquidity of licences will impact value of new entrant spectrum and potentially, further investment".[71]

133. I accept the Plaintiffs' submission that even the act of consulting on the change in the transfer process was known and understood by the Government to be "[d]isruptive to investment", and that signaling a possible change to the rules around transferability meant that the "[v]alue of spectrum held by new entrants would be reduced"[72].

134. Perhaps one of the clearest acknowledgements from the Government about the impact on licencees, as well as their investors, came from James Nicholson ("Nicholson").

135. During the years relevant to this litigation, Nicholson was not an employee of Industry Canada, but rather was Director of Policy and Acting Chief of Staff to the Minister of Industry as part of the Minister's senior political staff. His conduct relevant to this action is discussed at length below, but importantly, Nicholson acknowledged that government actions negatively affected the transferability of licences; that they directly affected licencees; and that they directly affected the investors who capitalized such licences:

> Q. In targeting TELUS you were also targeting Mobilicity, right? That's - we can agree on that. TELUS wanted to acquire Mobilicity, Mobilicity had told you that it wanted to be acquired by TELUS. They'd come up to see you about that. So you knew that in targeting TELUS, you were targeting Mobilicity as well; correct?
>
> A. We knew that this had implications for Mobilicity.
>
> Q. Right. Direct implications, right?
>
> A. Yes.
>
> Q. And you also knew that it had direct implications for the investors who capitalized Mobilicity, right?
>
> A. By inference, yes.[73]

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[70] Examination-in-Chief of Kevin McSweeney, December 6, 2023, at pp. 1444-1446.
[71] Exhibit 52, Witness Brief of Documents for Kelly Gillis, p. 58.
[72] Exhibit 49, Brief of Redacted Documents, Tab 2, Draft Deck: Spectrum Transfers (October 2012), p. 15.
[73] Cross-examination of James Nicholson, December 21, 2023, Transcript, at p. 3632.

136. Finally, Industry Canada itself acknowledged that it foresaw precisely the harm that the Plaintiffs ultimately suffered. In a January 31, 2013 Presentation, which was acknowledged to be representative of the attitude of the Policy Group in Industry Canada at the time,[74] officials (including Gillis[75]) stated that blocking (or prohibiting) deals for the transfer of existing spectrum could result in legal action "based on a reduction in the re-sale value of licence".[76]

137. Moreover, these acknowledgements are consistent with numerous documents published by Industry Canada's guidelines for precisely these audiences (i.e., investors in licencees). Such was clear at least as far back as the August 1, 1997 *Consultation on Issues Related to Spectrum Auctioning*.

138. In the *2001 Framework* discussed above, the Government expressly and specifically provided assurances to these very investors in acknowledging the critical importance of the licence attributes and the corresponding certainty in what was being offered:

> Understanding exactly what is being auctioned is very important for bidders to develop business plans, secure adequate financing and develop a bidding strategy … It is important to provide bidders, and subsequently licencees, with a well-defined set of licence attributes so as to enhance their abilities to secure financing; to invest in their networks; and, to provide the best possible services to Canadian consumers.[77]

139. I pause to observe that, as demonstrated by the above excerpt, Industry Canada, as well as the Minister's own senior staff (Nicholson), not only recognized the importance of certainty concerning licence attributes (including transferability to Incumbents), but it also recognized that bidders were a different constituency than subsequent licencees (or transferees), and that external investors were yet another separate constituency still. Industry Canada made the representations to all of them, and intentionally so.

140. Moreover, all licencees or applicants were required to disclose their beneficial ownership to satisfy domestic ownership eligibility requirements. Accordingly, the involvement in Mobilicity of DAVE and Quadrangle was required to be, and in fact was, disclosed to Industry Canada.

141. The reasons above relate to the representations made in 2006, 2007, and 2008, and the related implementation of the *2013 Transfer Framework* approximately four years later.

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[74] Cross-examination of Kelly Gillis, December 19, 2023, Transcript, at pp. 3233-3234.
[75] Cross-examination of Kelly Gillis, December 19, 2023, Transcript, beginning at p. 3225
[76] Exhibit 48, Cross Examination Brief re Peter Hill, Tab 22, Competition in the Wireless Sector Deck, at p. 8.
[77] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 6, 2001 Framework for Spectrum Auctions in Canada, s. 4 Licence Attributes.

142. As I have found, these Plaintiffs were specifically known to the Government. This was a small universe of participants in a highly capital-intensive and highly regulated business of wireless services in Canada. This was the opposite of some undetermined and unknown number of members of the public.

143. The Plaintiffs continued to be known to the Government in 2014 and 2015, which is relevant to the subsequent allegations. Further, not only were the Plaintiffs known to the Government, but the actions of the Government were specifically and intentionally directed towards them.

144. In short, all the harm alleged was reasonably foreseeable and the first element necessary to ground a duty of care has been established.

145. I therefore turn to the second and third elements, which together comprise the two-stage *Anns/Cooper* analysis: whether there was sufficient proximity; and whether there are residual policy reasons for declining to impose such a duty.

The First *Anns/Cooper* Stage: Was There Sufficient Proximity?

146. The Court of Appeal stated in *Aylmer* that:

> [24] The term "proximity" in the context of public actors is generally used in the authorities to characterize the type of relationship in which a duty of care arises from a statute or through the interactions between the governmental actor and the plaintiff in the operation of a statutory scheme.[3] The court must consider whether the case falls within or is analogous to a category of cases in which a duty of care has previously been recognized. If the case does not fall into a recognized category, then the court considers whether the case is one for which a new duty of care should be recognized: *Cooper*, at para. 31.
>
> [25] The key cases in the evolution of the *Anns/Cooper* test after *Cooper*, in the context of the negligence of government agencies, are *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129; *R. v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42, [2011] 3 S.C.R. 45; and *Nelson (City) v. Marchi,* 2021 SCC 41.
>
> [26] In *Nelson*, the Supreme Court explained, at para. 41, that: "[a]s a general rule, the traditional tort law duty of care will apply to a government agency in the same way that it will apply to an individual" (citing *Just v. British Columbia*, 1989 CanLII 16 (SCC), [1989] 2 S.C.R. 1228, at p. 1244).
>
> [27] But *Cooper* had introduced a potential stumbling block for plaintiffs that was later clarified in *Imperial Tobacco*. At para.

43 of *Cooper,* the court stipulated that, “the factors giving rise to proximity, if they exist, must arise from the statute under which the Registrar is appointed.” Because “that statute is the only source of his duties, private or public…[i]f a duty to investors with regulated mortgage brokers is to be found, it must be in the statute”. Plaintiffs did not fare well under this single-source stipulation.

[28] In *Imperial Tobacco*, McLachlin C.J. clarified *Cooper*. She identified three situations in which legislation could play a role in determining whether the governmental actor owes the plaintiff a *prima facie* duty of care. The first is where the legislation gives rise to a duty of care explicitly or by implication. The second is:

> [W]here the proximity essential to the private duty of care is alleged to arise from a series of specific interactions between the government and the claimant. The argument in these cases is that the government has, through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care. [Emphasis added].

The third type of situation combines the other two: *Imperial Tobacco*, at paras. 43-46.

[29] Courts determine proximity in new situations by "looking at expectations, representations, reliance, and the property or other interests involved", in order to "evaluate the closeness of the relationship between the plaintiff and the defendant", and by asking "whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant": *Cooper*, at para. 34. However, "[t]here is no definitive list" of factors: *Syl Apps*, at para. 30.

[30] I consider *Hill* to be somewhat analogous to this case. In *Hill*, the court recognized the tort of negligent investigation by police. McLachlin C.J. stated that while proximity requires the actions of the wrongdoer to have a sufficiently "close and direct" effect on the victim, this does not require physical proximity: at para. 29. The absence of a personal relationship, while an "important factor to consider", is "not necessarily determinative": at para. 30.

[31] In *Hill*, McLachlin C.J. noted that once an investigating police officer identifies a “particularized suspect”, “a close and direct relationship” arises between the officer and the suspect: at

> para. 33, even in the absence of "personal representations and consequent reliance": at para. 34. This is because the "targeted suspect", whose interests are directly affected, has a stake in the investigation: at para. 34.
>
> [32] If the court finds proximity at the first *Anns/Cooper* stage, the second stage of the analysis comes into play.

147. In my view, the relationship and interactions between the Plaintiffs and Defendant in the operation of the relevant statutory scheme (i.e., the regulation of spectrum through the issuance and imposition of conditions of spectrum licences) was sufficiently proximate so as to provide the basis for a duty of care.

148. Justice Lauwers, writing for a unanimous Court of Appeal in *Aylmer*, quoted from *Cooper* and McLachlin C.J.'s identification of three situations where legislation could play a role in determining whether the governmental actor owes the plaintiff a *prima facie* duty of care.

The First Situation: An Explicit or Implied Duty of Care

149. The first situation is where the legislation gives rise to a duty of care explicitly or by implication.

150. I find that applies here. The *Crown Liability and Proceedings Act* expressly provides that the Crown is liable for the damages for which, if it were a person, it would be liable, in respect of a tort committed by his servant of the Crown (s. 3(b)(i)). Further, there is nothing in the *Radiocommunication Act* that provides that a private law duty of care owed to holders of spectrum licences cannot arise.

151. The "doctrine of jurisdiction by necessary implication" states that legislative silence does not always amount to a gap in the legislative scheme. Rather, the court may construe the powers conferred by an enabling statute 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". The court must do so without crossing the line between judicial interpretation and legislative drafting: *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 51.

152. A court may apply this doctrine where:

- the jurisdiction sought is necessary to accomplish the objectives of the legislative scheme and is essential to the body fulfilling its mandate;
- the enabling act fails to explicitly grant the power to accomplish the legislative objective;

- the mandate of the statutory body is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;

- the jurisdiction sought must not be one which the statutory body has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and

- the legislature did not address its mind to the issue and decide against conferring the power upon the statutory body.

See: *ATCO,* at para. 73.

153. I therefore find that a duty of care is permitted both directly and by implication.

154. As the Court of Appeal for Ontario observed, the statutory scheme must be examined to determine whether it forecloses such a duty. That duty can arise where the statutory scheme in play does not preclude the recognition of a common law duty of care: *Rausch v. Pickering (City)*, 2013 ONCA 740, 369 D.L.R. (4th) 691, at paras. 46-47.

155. In this case, there is nothing in either the *Crown Liability and Proceedings Act* or the *Radiocommunication Act* that impedes a finding that such a duty may exist in appropriate circumstances.

156. Moreover, I am reinforced in this conclusion by the fact that, as noted above, Parliament amended the *Radiocommunication Act* in 1996 to introduce auctions as a commercial mechanism to allocate spectrum and issue licences.

157. By doing so, Parliament elected to preserve a right of action and tort liability against the Crown for those injured by the conduct of the Minister's servants and agents, which in this case include employees of Industry Canada. I accept the Plaintiffs' submission that the preservation of exposure to liability for the Crown under the *Crown Liability and Proceedings Act* flows from s. 17(2) of the *Radiocommunication Act*.

158. In my view, the introduction of an auction as a commercial mechanism to effectively sell licences at market rates is an important feature of the analysis. The reality is that the situation in the present case bears little resemblance to a more traditional or typical licencing regime where a government issues a licence such as a driver's licence or a business permit, for a nominal or administrative fee. The circumstances here are profoundly different. The Government effectively sold the licences to the Plaintiffs for approximately $243 million.

The Second Situation: A Series of Specific Interactions Between the Government and Claimant

159. The second situation the Court of Appeal identified is where the proximity essential to the private duty of care is alleged to arise from a series of specific

interactions between the government and the plaintiff, such that the government has, through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care.

160. I find that the specific interactions between Industry Canada and the Plaintiffs were such that the Defendant entered into the necessary special relationship.

161. The Plaintiffs were not simply members of the general public. On the contrary, they were the very parties that the Government was trying to attract as investors to capitalize new entrants in Canada's wireless business. This further reinforces the point above – the Plaintiffs invested almost a quarter of a billion dollars. The universe of potential "new entrants" was extremely limited, given the significant capital requirements necessary to seriously participate in a spectrum auction.

162. The Defendant specifically courted and induced that limited universe of potential new entrants to participate in the 2008 AWS Spectrum Auction, in large part by the fact that defined spectrum licences were part of the "set-aside" component reserved exclusively for new entrants and for which Incumbents could not bid (as they would have done).

163. The Defendant formally admitted in this action that Dr. Michael Binder ("Binder"), the then Assistant Deputy Minister for the Spectrum, Information, Technologies and Telecommunications Sector at Industry Canada and the most senior federal bureaucrat with responsibility for spectrum allocation, was, on behalf of Industry Canada, actively "seeking prospective investors and encouraging them to participate in the auction."[78]

164. The Defendant specifically courted *these* Plaintiffs. In fact, and also as admitted, it was at a meeting with Bitove and Stewart Lyons ("Lyons") on behalf of the Plaintiff that Binder made the very representation that Industry Canada was actively seeking prospective investors and encouraging them to participate in the auction.[79]

165. The evidence of Lyons, the Executive Vice President of Operations at Sirius XM and Bitove's "right hand man", was consistent with the Defendant's admission to the effect that he, together with Bitove, met with Binder on October 4, 2006. Bitove tasked Lyons to effectively manage due diligence for the Plaintiff Obelysk about the business opportunity of participating in the spectrum auction. It was admitted at trial that this meeting took place, and that the parties discussed the upcoming AWS-1 auction.[80]

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[78] Exhibit 4, Plaintiff's Request to Admit, at para. 25; Exhibit 5, Defendant's Response to Request to Admit, at para. 1.
[79] Exhibit 4, Plaintiff's Request to Admit, at paras. 23, 24, 25; Exhibit 5, Defendant's Response to Request to Admit, at para. 1.
[80] Exhibit 4, Plaintiff's Request to Admit, at paras. 23, 24, 25; Exhibit 5, Defendant's Response to Request to Admit, at para. 1.

166. Lyons testified that he had a clear recollection of that meeting. His evidence was that Binder's approach was "salesmanship to try and get us to be interested in the auction."[81] This was consistent with Bitove's recollection, who described Binder in his evidence as being in "selling mode" during the meeting. Lyons stated:

> Q. Mr. Lyons, what was your understanding of why Mr. Binder raised the spectrum auction opportunity with you and Mr. Bitove?
>
> A. He made it clear to us that he -- the government was looking for new entrants to compete against the big three, that we were the right kind of people for that opportunity because we were entrepreneurial, aggressive, we had been successful in satellite radio so far competing against incumbents in that industry. And he thought we would be the right kind of people to compete in the wireless industry as well.
>
> Q. For the court, can you explain who you are talking about when you say big three?
>
> A. Sorry, I'm referring to Bell, TELUS and Rogers, the big three wireless incumbents.
>
> Q. Thank you. What did Mr. Binder tell you about the auction?
>
> A. He said three things. Effectively, the first would be quote, unquote, special rules for special people, and by that he meant there would be a portion of the spectrum in this auction that only new entrants could bid on. The incumbents couldn't bid on it.
>
> He also said that there would be rules to deal with the competitive issues faced by going up against three entrenched providers, certain rules to allow us to be competitive, and he also said that any spectrum, any licences would be transferable.
>
> Q. Thank you. Mr. Lyons, it's admitted that Industry Canada was looking for prospective investors and encouraging them to participate in the auction.[82] What did Mr. Binder tell you about this?
>
> A. He said that they were looking – this was going to be a great opportunity for us, and when the person in charge of spectrum tells you there's a great opportunity in spectrum, you tend to listen to it. So we were intrigued. We had concerns about competing with three very large very successful very well-financed incumbents, and he sort of mentioned there would be

[81] Examination-in-Chief of Stewart Lyons, December 4, 2023, Transcript, at p. 769.
[82] Exhibit 4, Plaintiff's Request to Admit, at para. 25; Exhibit 5, Response to Request to Admit, at para. 1.

> rules to help us compete, and that licence would be transferable if things didn't work out.[83]

167. As stated above, the Defendant admitted the fact that the meeting occurred, and that the then upcoming spectrum auction was discussed. The Government did not challenge Bitove or Lyons on their recollection as described above, and for his part, Binder had no clear recollection of the meeting whatsoever.

168. While not recalling that meeting specifically, Binder's evidence as to statements he made generally were consistent with what Bitove and Lyons testified that he told them. The position of the Government is to the effect that the purpose of the meeting was to discuss business issues related to Bitove's satellite radio business (SiriusXM) and related issues.

169. However, as the Defendant itself concedes in its Closing Submissions, Binder told Bitove that Industry Canada was working on a spectrum auction of a new band and were looking for new entrants to put competition to existing players, particularly existing "telcos" (i.e., the Incumbents). As the Government itself concedes, among other things, Binder told Bitove and Lyons that Industry Canada was seeking prospective investors and encouraging them to participate.[84]

170. Binder readily acknowledged that he gave "[a] lot of speeches … for a long period of time … to try to get investment in Canada" because "we knew there was some serious money [that] will go into this auction."[85] Moreover, that general recollection is entirely consistent with Industry Canada's statements in its published documents summarized above, and particularly those governing the 2008 AWS Spectrum Auction.

171. Finally in this regard, it was admitted by the Defendant that Bitove on behalf of the Plaintiffs, and Binder on behalf of Industry Canada, had a number of further conversations and meetings about the terms of the AWS auction through the balance of 2006 and into 2007.[86]

172. Lyons' evidence was that he and Bitove spoke with Binder specifically about the conditions under which they would consider investing:

> Q. Mr. Lyons, having regard to the incumbents in the market, what concerns did you have, if any, about Mr. Binder's encouraging you to participate?
>
> A. Several. I mean everyone was quite familiar with at the time the size and heft of Bell, Telus and Rogers, and their ability to

[83] Examination-in-Chief of Stewart Lyons, December 4, 2023, Transcript, at pp. 765-767.
[84] Defendant's Closing Submissions, para. 90, relying on Exhibit 4, Plaintiff's Request to Admit, at para. 25; Exhibit 5, Defendant's Response to Request to Admit, at para. 1.
[85] Examination-in-Chief of Michael Binder, December 19, 2023, Transcript, at pp. 3038, 3050.
[86] Exhibit 4, Plaintiff's Request to Admit, at paras. 26-32; Exhibit 5, Defendant's Response to Request to Admit, at para. 1.

> compete, and they were aggressive and they don't like other people playing in their industry. So we were very concerned about the competitive issues, and how this would all play out.
>
> Q. Did you talk to Mr. Binder about the conditions under which you would consider investing?
>
> A. Yeah, we said we would like -- there would have to be rules to make it competitive, and licences would have to be transferable because there needs to be a pathway to exit if this weren't working out, and that it would have to be compelling.
>
> Q. Can you explain what you mean by pathway to exit in that context?
>
> A. That the licences would be transferable if the investment wasn't --if we were to do this, and this is early days obviously, we would undertake to build a business, but if that wasn't working out, there needed to be a way to exit that business.
>
> Q: And what was Mr. Binder's response to you telling him about conditions under which you would consider investing?
>
> A. He assured us that the government had thought about that and he had mentioned the conversations turned to the previous new entrants, Microcell and Clearnet, and we discussed that a little bit and he said, look, the government is aware of the challenges there, and we are going to do things to make it more easy for you to compete with the big three than it was for those folks.[87]

173. I accept the evidence of Lyons and Bitove about these representations made by Binder on behalf of Industry Canada. Their recollection in this regard was clear, and it is consistent with the contemporaneous documents. As summarized above, those documents reflected plainly the intention and policy of the Government to encourage and incentivize new investment to increase competition in the wireless sector.

174. I also accept the evidence of Lyons to the effect that he had various communications with Hill during which the transferability of licences was discussed. I recognize that there are no contemporaneous documents memorializing these discussions. Hill denies having had these telephone calls with Lyons. However, he has a recollection not only of speaking with Bitove, but having done so on one occasion

[87] Examination in Chief of Stewart Lyons, Transcript, December 4, 2023, pp. 767-770.

where he recalls specifically that it was in April 2008.[88] He had no notes or contemporaneous documents memorializing that conversation either.

175. With respect to this conversation, in my view, the evidence of Hill does not assist the Defendant. He does not have any record of the call. It is not clear why it would stand out for him (in contradistinction to Bitove and Lyons, for whom the issues had unique importance), such that he was able to recall that it had occurred, including the specific month and year when it had occurred, some 15 years later.

176. Unlike the call with Binder, who had responsibility for a broader area (including satellite radio), Hill's responsibility was limited exclusively to spectrum licensing and management. He had nothing to do with satellite radio or the other businesses with which Bitove was involved, and there would be no reason for the call other than to discuss the upcoming spectrum auction and potential investment therein.

177. Moreover, he (Binder) had no specific recollection of what was actually said by either party, but instead, his evidence relied on generalities: "I always talk about ministerial discretion, because it's the environment I worked in".[89]

178. Finally in this regard, the evidence of Hill on the point is inconsistent with the recollection of McSweeney refreshed with transcripts of his two recorded conversations with Hill, in which not only spectrum licensing, but the specific issue of transferability in the event of a business failure, were discussed.

179. The Defendant specifically courted the same universe of potential new entrants to participate in the 2008 AWS Spectrum Auction by making the representation that the spectrum licences being auctioned had the express attribute of "enhanced transferability" which distinguished them from other licences, and which specifically contemplated that the licences could be transferred to Incumbents after five years.[90]

180. The approach to a determination of whether there is a duty of care in cases of pure economic loss caused by negligent misrepresentation is the same as in other negligence cases and is consistent with the framework set out above: *Darmar Farms Inc. v. Syngenta Canada Inc*., 2019 ONCA, 148 O.R. (3d) 115, at para. 54:

> [54] In *Deloitte & Touche v. Livent Inc. (Receiver of),* [2017] 2 S.C.R. 855, [2017] S.C.J. No. 63, 2017 SCC 63, the Supreme Court reviewed the approach applicable to determining the existence and extent of a duty of care in a claim for economic loss. I summarize the principles that are relevant to the analysis here.

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[88] Defendant's Closing Submissions, at para. 157; Examination-in-Chief of Peter Hill, December 13, 2023, Transcript, at pp. 2340-2341.
[89] Examination-in-Chief of Peter Hill, December 13, 2023, Transcript, at pp. 2341-2342.
[90] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests and Decisions, Tab 13, 2007 CPC-2-1-23, s. 5.6 Transfer and Divisibility of Spectrum Licences.

> -- The approach to determining a duty of care in cases of pure economic loss should be the same whether the claim is one for negligent misrepresentation or other cases of negligence. [page 128]
>
> -- The approach is the modified *Anns/Cooper* test, which addresses the question of whether a duty of care exists in two stages, first, whether a prima facie duty exists and if so, second, whether residual policy considerations should negate or limit the duty.
>
> -- At the first stage the court considers (i) proximity, namely, whether the parties are in such a close and direct relationship that it would be just and fair to impose a duty of care in law; and (ii) foreseeability of harm, namely, whether an injury to the plaintiff was a reasonably foreseeable consequence of negligence of the defendant. A properly conducted stage one analysis will rarely, if ever, find a *prima facie* duty of care that could give rise to indeterminate liability.
>
> -- At the second stage the court considers whether, despite the reasonably foreseeable quality of the plaintiff's injury and the proximity of the relationship, the defendant should nonetheless be insulated from liability. This policy analysis is something which should be relied on narrowly, and rarely if ever due to concerns about indeterminate liability which ought not to persist after a proper stage one analysis.
>
> See *Deloitte*, at paras. 16, 22-23, 25, 32 and 41-42.

181. In addition, "it is not simply the existence of a *category* of proximate relationship that matters; the *scope* of that proximate relationship must also be considered": *Darmar*, at para. 60, citing *Deloitte*, at paras. 30-31.

182. The scope of proximity and of reasonable foreseeability in a misrepresentation case is defined by the purpose for which the representation was made. As a *prima facie* duty of care arises from a relationship of proximity such that the failure to take reasonable care might foreseeably cause loss or harm, proximity in the context of a negligent misrepresentation claim arises from a special relationship if the defendants ought reasonably to foresee that, in all the circumstances, the plaintiff will reasonably rely on the representations and those representations are within the scope of the defendant's undertaking: *Darmar*, at paras. 54-63, citing *Deloitte*, at paras. 16, 22-24, 25, 31, 32, 34 and 41-42.

183. Specific representations by a regulator to an individual, and reliance by that individual on those representations, will go a long way towards establishing a *prima*

facie duty of care: *Taylor v. Canada (Attorney General)*, 2012 ONCA 479, 111 O.R. (3d) 161, at para. 115.

184. To the Plaintiffs, the most relevant "special rule for special people" Lyons referred to was the "enhanced transferability" of the spectrum licences and the fact that they could be transferred to Incumbents after the five-year moratorium.

185. I find that the Defendant owed a duty of care to the Plaintiffs when it expressly, intentionally, and specifically represented to them, as well as to other parties similarly situated (i.e., other potential licencees or their investors), the ability to transfer the spectrum licences to an Incumbent after five years.

186. The proximity requirement cannot be reduced to a list of factors or circumstances which, if they exist, will always create a relationship of proximity between the plaintiff and a defendant. Proximity is a concept, not a test. The concept of proximity describes the relationship between a plaintiff and a defendant that is sufficiently close and direct to render it fair and reasonable to require that the defendant, in the conduct of its affairs, be mindful of the plaintiff's legitimate interests: *Aylmer*, at para. 29, citing *Syl Apps Secure Treatment Centre v. D. (B.)*, 2007 SCC 38, [2007] 3 S.C.R. 83, at para. 30; and *Taylor*, at paras. 15 and 66, citing *Cooper*, at paras. 32-36, and *Canadian National Railway Co. v. Norsk Pacific Steamship Co*., [1992] 1 S.C.R. 1021, at p. 1151.

187. Hallmarks of proximity include participation in commercial relationships, direct interactions between the government and private individuals, and contractual agreements between the government and businesses: *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 53-54. As stated by the Court of Appeal in *Taylor*, at para. 69:

> While the authorities are careful to deny that any one factor or combination of factors is necessary to establish proximity, [page 180] certain factors will routinely take a central role in the proximity analysis. These include any representations made by the defendant, especially if made directly to the plaintiff, alliance by the plaintiff on the defendants, representations, the nature of the plaintiff's property or other interest engaged, the specific nature of any direct contact between the plaintiff and the defendant, and the nature of the overall relationship existing between the plaintiff and the defendant: see Cooper, at paras. 34-35; Hill, at paras. 29-30.

188. Industry Canada specifically courted, induced, and encouraged these Plaintiffs to invest prior to Mobilicity's incorporation. There were direct and specific discussions between Government officials and Bitove and Lyons. There were further direct discussions with investors in Mobilicity such as McSweeney on behalf of CI. Finally, as is clear from the Government's own documents, as well as the evidence of its witnesses at trial, there was a specific and express awareness of an intention to attract

investors such as Quadrangle. To confirm eligibility and, particularly, a Canadian element to ownership to hold the Mobilicity spectrum licences following the 2008 AWS Spectrum Auction, the identities of these Plaintiffs (Obelysk and Quadrangle) were disclosed specifically by name.

189. The evidence at trial, and particularly that of Bitove, was to the effect that Hill courted and specifically encouraged him to "become a new entrant" in Canada's wireless market as such new entrants were being sought by Industry Canada, particularly in respect of the then upcoming 2008 AWS Spectrum Auction.

190. I note that Huber never met Hill or Binder. However, Huber testified about what Bitove told him regarding the initial Government representations:

> Q. What was your understanding, sir, as of March of 2008, about what dialogue Mr. Bitove had had with the regulator about the prospect of capitalizing a new entrant and participating in the auction?
>
> A. Well, John was -- Mr. Bitove was particularly excited about the fact that the government had come to him and had asked him to participate in this and really seen him as someone who could motivate the kind of activity that they were looking for in the sector. And subsequently he and his team had spent quite a bit of time in dialogue with the regulators because they were always in dialogue with the regulators so that became a component of their conversations as the situation developed in Canada.
>
> Q. And what did Mr. Bitove tell you, if anything, about his dialogue with the regulators regarding this new entrant and its participation in the auction?
>
> A. He mentioned he had met with the regulator, a Mr. Binder, who had acknowledged that the government had really not accomplished what it wanted to accomplish with MicroCell and Clearnet, and that it was determined to create circumstances that would allow for competitive entry to flourish in Canada. And, you know, in particular, they were going to put in place conditions that would explicitly support the new entrants. In the one, you know, there were a couple that he was focused on but one of them was the fact that the government acknowledged that they were going to put these conditions in place and if the conditions didn't work, then ultimately there would be the ability to transfer the spectrum to an incumbent.
>
> Q. And you mentioned the conditions that they would put in place; what were those conditions?

> A. Well, by the -- so, by the time he and I met, those conditions had been set so, you know, he was talking about -- the dialogue he'd had and the comfort he had from the government because he'd been part of this, and the government had been speaking to him from the beginning. By the time I got involved and by the time I met with Mr. Bitove I had already read the documents for myself and they were -- they were clear on some things. I mean, the transferability of the licence was actually quite clear. Other things, such as the roaming and the tower sharing, referenced the fact that those are trickier because those involve the cooperation of the incumbents, you can't simply rely on the government to accomplish those things.[91]

191. While maintaining that the parties broached several topics at the initial meeting, Hill did not deny that the Government made the above representations to Bitove. In fact, Hill testified that he and Bitove discussed licence transferability.[92]

192. I am satisfied that there were specific interactions the tween these Plaintiffs and the Government, such as was contemplated in the second type of situation described by Lauwers, J.A.

The Third Situation: A Combination of the Previous Two

193. I further find that the third type of situation described by Lauwers, J.A. as being relevant to the issue of whether the governmental actor owes the plaintiff a *prima facie* duty of care, being a combination of the first two, also applies here: *Aylmer*, at para. 28, citing *Imperial Tobacco*, at paras. 43-46.

194. As previously discussed, there is no definitive "list" of factors: *Aylmer*, at para. 29, citing *Syl Apps*, at para. 30; and *Taylor*, at paras. 15 and 66, citing *Cooper*, at paras. 32-36, and *Canadian National Railway Co. v. Norsk Pacific Steamship Co*., [1992] 1 S.C.R. 1021, at p. 1151.

195. I accept the submission of the Defendant, made with reference to *Deloitte*, that the question of whether proximity exists between two parties at large or only for some purposes will depend on the nature of the particular relationship. The fact that proximity has been found between the government and the plaintiff in one context does not mean it exists in all contexts. An analysis of whether the requisite relationship of proximity exists entails asking whether the parties are in such a "close and direct" relationship that

[91] Examination-in-Chief of Michael Huber, December 5, 2023, Transcript, at pp. 1019-1021.
[92] Examination-in-Chief of Peter Hill, December 13, 2023, Transcript, at pp. 2340-2342.

it would be "just and fair having regard to that relationship to impose a duty of care in law": *Deloitte*, at paras. 23-25, citing *Cooper*, at paras. 32, 24.[93]

196. I am satisfied on the evidence in this case, and by "looking at expectations, representations, reliance on the property or other interests involved" in order to "evaluate the closeness of the relationship between the Plaintiffs and the Defendant, that it is just and fair, having regard to that relationship, to impose a duty of care in law upon the defendant'": *Aylmer*, at para. 29, citing *Cooper*, at para. 34.

197. Here, the expectations, representations, reliance, and other factors are such that it is just and fair to impose a duty of care on the Government.

198. These expectations, representations, reliance, and other factors are clear on the evidence. The representation that the set-aside licences would be transferable to Incumbents after the five-year moratorium was made repeatedly. It was made expressly to set the Plaintiffs' expectations and, in fact, did so. The Plaintiffs believed that there was an exit strategy for new entrants if they needed to sell. That was exactly the safety net required by potential new entrants. It was also exactly the safety net represented and offered by the Government to incentivize investors to fund new entrants.

199. Finally, the Plaintiffs relied upon the representations. The evidence of each of Bitove, Lyons, Huber, and McSweeney was clearly to this effect, and none of these witnesses were shaken on these points in cross-examination.

200. Bitove's evidence was clear on this point:

> Q. Okay. Let's assume we don't have that transfer framework which you say interfered with the market. Do you say that without that framework, Mobilicity should have been sold at the earliest opportunity?
>
> A. I think without that framework, had we made it to the fifth anniversary without the rules changing, we could have had a robust option for our spectrum assuming we were not operating the business either solo or with Wind.
>
> Q. But you've told us that you didn't like the Telus deal, the first one or the second one or the third one. And you say that the transfer framework dampened the market, dampened the enthusiasm for spectrum. Is it not the case, then, absent that transfer framework, those deals should have been accepted?
>
> A. Not if you believed what Mr. Binder told me at the first meeting and that seemed to be the case, which is there will be a moratorium and after that, the Big 3 can buy them.

[93] See also: Defendant's Statement of Legal Principles, paras. 8-9.

Q. Right.

A. So if you take those words at heart, then when someone like Mr. Entwistle calls and says will you support a Telus transaction and you say no. And yes, you have a problem with price, but you have the absolute principle of saying it said five years, everyone was clear on five years, Darren, don't waste your time.[94]

201. Lyons stated the following:

Q: … I'm going to suggest to you that you did not have a specific conversation with Mr. Binder that the precedent for Microcell and Clearnet was going to be the status quo for how transfers would be considered for AWS spectrum after the five-year moratorium?

A. He -- I guess those are two parts of the conversation that weren't connected, so I can't say that -- what he did say effectively is that licences were transferable, but he didn't say that in the context of Clearnet or Microcell. So there were just two distinct parts of the conversation.[95]

202. Huber's evidence on this issue was as follows:

Q. And then my friend took you to section 16 which dealt with amending terms and conditions; the Minister reserves, retains the discretion to do so at any time. And you told us that you believe that there was a fundamental distinction and I may not have your words quite right, between some licence attributes and the licence attribute of transferability and divisibility. Have I got that right?

A. Yes. Well, I would actually say the government told me that there was a difference between fundamental attributes and --

Q. The government told you that in 22 CPC-2-1-23?

A. I -- sometimes I think we lose the forest for the trees so I won't belabour this. In the 2007 framework we just looked at, we saw that there was the condition of enhanced transferability that I believe was called a right. So I would call a right an attribute with steroids. And that document specifically referred me back to the 2001 document and it said, not because the 2009 framework deviates from it, but because it said the auction should be conducted in accordance with.

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[94] Cross-Examination of John Bitove, November 30, 2023, Transcript, at pp. 483-484.
[95] Cross-Examination of Stewart Lyons, December 4, 2023, Transcript, at pp. 836-837.

> When I read that document in 2001 which you took me to yesterday, the government explicitly tells me that it understands the exact terms. Any section that describes attributes, it tells me that the exact terms need to be understood by the auction investor, the investor who's going to participate in the auction prior to the auction. So the government has told me that there are attributes that I have to understand before the auction.
>
> Q. All right.[96]

203. Finally, McSweeney's evidence was to the same effect, as summarized above in relevant part. He was reassured as an investor by the confirmations he received during his two telephone calls with Hill.[97]

204. The Government's submission in response is that there was no guarantee of success, that Mobilicity failed for a myriad of reasons unrelated to any actionable conduct of the Government, and that no representation made by or on behalf of the Government guaranteed the success of new entrants. The Government states in its Closing Submissions that "the Government of Canada is not an insurer (...) The Government does not owe a duty to the Plaintiffs to safeguard their investment and guarantee a reasonable rate of return."[98] The submission continues that a finding of liability here would lead to a risk of indeterminate liability, and that the *de facto* creation of an insurance scheme. I cannot accept this argument.

205. Clearly, there was no guarantee of success; businesses can succeed or fail for a variety of reasons. However, in my view, that is exactly the point. There was no guarantee of success, and there was a significant risk of failure for new entrants. That risk was, as summarized above, specifically referenced in the Government's policy documents explaining the rationale and purpose for the 2008 AWS Spectrum Auction in the first place. The risk of failure is precisely why the Plaintiffs relied upon the representation of transferability to the only realistic universe of potential purchasers (the Incumbents), just as they were intended to. Accordingly, in my view, the Plaintiffs relied on the representations just as the Government intended and hoped they would do, and this reliance was reasonable.

206. I recognize the Government's broad general discretion to make policy decisions, but for the reasons set out above, I reject the Defendant's submission that in this case, it retained the ability to remove the transferability attributes at any time it saw fit and avoid liability to these Plaintiffs.

207. However, if I am in error in finding, as I have, that the Government made specific representations to these Plaintiffs, I would find that Industry Canada's representations were also misrepresentations by omission, in that Industry Canada

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[96] Cross-Examination of Michael Huber, December 6, 2023, Transcript, at pp. 1255-1256.
[97] Examination-in-Chief of Kevin McSweeney, December 6, 2023, at pp. 1444-1446.
[98] Defendant's Closing Submissions, at paras. 2, 3.

clearly, in my view, led licencees and investors to believe that the licences were transferable to incumbents after five years.

208. In *Arora v. Whirlpool Canada LP*, 2013 ONCA 657, 118 O.R. (3d) 113, leave to appeal refused, [2014] S.C.C.A. No. 35661, the appellants sought to certify a class action against Whirlpool Canada LP and Whirlpool Corporation, alleging that their front-loading washing machines were poorly designed and prone to developing an unpleasant smell. The appellants relied on representation by omission, in that Whirlpool did not tell them that front-loading washing machines are more susceptible to buildup and therefore, odours.

209. The Court of Appeal agreed with the trial judge's acknowledgement that "in some instances silence may constitute a misrepresentation", but observed that "as a general rule, however, silence is not a representation, unless there is a duty of care, a statutory duty to disclose, or a fiduciary duty to speak": at paras. 45-46. Unlike *Arora*, I have found that the Government owed the Plaintiffs a duty of care. Thus, their silence regarding the transferability attribute can give rise to a representation by omission.

210. The Government's submission was that, if Industry Canada represented, as it clearly did, that the set-aside licences would not be transferable to an Incumbent for five years, there was nothing in that representation that stated that the licences would be transferable after that five-year period.

211. The Mobilicity Spectrum Licences clearly include the term providing that they cannot be transferred to an Incumbent for five years. That is not disputed. The Defendant places significant reliance on s. 16 of the Appendices to the Mobility Licences which states that the Minister may amend the licence terms at any time. The submission is that s. 16 is an express contractual provision providing that there is no promise whatsoever about the licence term.

212. I reject the Defendant's submission to the extent that the Defendant relies on this contractual provision as negating a misrepresentation by omission. I do so for the same reasons that I reject the submission that s. 16 qualifies the representation and term regarding transferability to an Incumbent after the five-year period.

213. The Defendant submits that even if such a representation was made, the Minister always retained the discretion, which flows from s. 16 of the Mobilicity Licence Appendices and from the Government's general power to make policy decisions as it sees fit, to amend or remove licence attributes at any time.

214. In my view, and as noted below in the Breach of Contract section, that position cannot succeed. Taken literally, it would mean that the Government could, as it did here, issue spectrum licences with a 10-year term in exchange for $243 million, and then, pursuant to s. 16, cancel them the following day, a year later, or two years later. The evidence is clear that that is not how any party interpreted and understood the licences to operate.

215. Numerous Government documents expressly discuss the importance, not only of a 10-year term, but also of the high expectation of renewal thereafter (assuming compliance). In short, the licences were promoted by the Government and understood by the Plaintiffs and all other investors and potential bidders, to authorize spectrum use for 10 years and beyond, assuming good behaviour.

216. Further, it is important to note that the argument advanced by the Defendant at trial is not how the Government itself interpreted s. 16 at the time the licences were issued or thereafter. For example, in November 2012, Shaw (another new entrant) which had acquired AWS spectrum in western Canada, entered into an agreement with Rogers (an Incumbent) pursuant to which Rogers agreed to purchase Shaw's set-aside Spectrum licences. While Rogers paid in advance for this option, it would be effective only following expiry of the five-year restriction on transfer.

217. The parties to that agreement requested that Industry Canada provide guidance on the proposed option agreement before it was completed. Industry Canada was of the view that the option agreement was contrary to the spirit of the auction rules and the five-year moratorium since it acted as a disincentive for Shaw to build out its own network, the very objective of the rule in the first place.[99]

218. However, and notwithstanding the significant policy concerns of Industry Canada and s. 16 of the licences, Industry Canada still recognized that the terms of licence prevented them from blocking the transaction. Gilfillan conceded on cross-examination that a transfer had to be approved, subject to the five-year restriction, so long as the parties complied with the conditions of licence and the eligibility requirements (e.g., the recipient was a Canadian entity).[100]

219. Indeed, in internal Industry Canada correspondence on May 31, 2013, Gilfillan expressly acknowledged the previous expectation that Industry Canada would approve transfers after the expiry of the set-aside, and further acknowledged that as a result of the *2013 Transfer Framework*, that expectation, as she put it, "no longer exists".[101]

220. In other words, the *2013 Transfer Framework* completely vacated the promises and representations made, and the Government knew this.

221. Consideration of this exact issue went further within Industry Canada. Senior staff including, among others, Gilfillan, Hill, Gillis, and Industry Canada counsel drafted an electronic mail Memorandum to Iain Stewart, Senior Assistant Deputy Minister, noting among other things:

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[99] Cross-Examination of Peter Hill, December 14, 2023, Transcript, at pp. 2632-2633

[100] Cross-Examination of Fiona Gilfillan, December 12, 2023, Transcript, at pp. 2158-2160.

[101] Joint Submissions, 183: Internal Email Discussing Expectation that IC Would Approve Transfers After Expiration of Set-Aside, dated May 31, 2013.

- while the option agreement was contrary to the spirit of the AWS licencing agreement, it was not contrary to the letter of the condition of licence concerning licence transfer;

- "the reality is still that (the Minister of Industry) cannot turn down the transfer based on concerns that Rogers is acquiring too much spectrum";

- there would be "significant legal risks of extending the current transfer restrictions years after the AWS auction was conducted based on these rules. The risk of challenge is very high and the risk of losing at court is very real";

- investors could be dissuaded from participating in future auctions due to what they would likely interpreted as the "capricious actions of Industry Canada";

- we ran an auction based on the expectation of a five-year restriction on transfers of set-aside spectrum to incumbents. Billions of dollars were spent under the assumption that these rules would be respected. A knee-jerk reaction to a specific situation is not a sound policy approach.[102]

  [Emphasis added.]

222. Stewart subsequently agreed with this analysis and concurred that the recommendation of the department to the Minister should be that he should confirm that the option agreement complied with the conditions of licence. That in fact occurred on November 19, 2012, when Hill wrote to Rogers and Shaw observing that while the option agreement was inconsistent with the intent of the conditions and the framework, it was not prohibited under the condition of licence transferability.[103]

223. I pause here to note that in its Closing Submissions, the Government submits that one of the reasons that no duty is owed to at least one of the Plaintiffs, Quadrangle, is that its "due diligence did not involve speaking with any representative of Industry Canada or any Ministers (...) to confirm their understanding of the regulatory scheme" and instead, relied upon the various Industry Canada Policy Documents. [104]

224. As the above-noted electronic mail Memorandum makes clear, that reliance (which I have found) was reasonable, and the Government itself acknowledged exactly what it had promised in its own policy documents. Accordingly, there was nothing unreasonable in Quadrangle relying on those Government documents.

225. The Stewart Memorandum makes it clear that the reliance was not only reasonable, but precisely accurate: the Government interpreted the documents and representations in the very same way as did the Plaintiffs (and the market generally),

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[102] Exhibit 54, Email from H. McDonald to K. Gillis, and Others, November 9, 2012.
[103] Exhibit 4, Plaintiff's Request to Admit, at para. 63; Exhibit 5, Defendant's Response to Request to Admit, at para. 1.
[104] Defendant's Closing Submissions, at para. 169.

and the Minister was advised by (and agreed with) his senior staff that if the Government did what it was proposing to do (i.e., implement the *2013 Transfer Framework*), such would be contrary to the clear expectation on which the auction was run and would be seen as "capricious" and unlawful.

226. In my view, the Government's policy discretion cannot, in the particular circumstances of this case, override and negate the duty of care owed to the Plaintiffs. While the scope of that policy discretion is broad, it cannot be so broad as to render meaningless specific representations intentionally and expressly made by the Government to a very limited class in these circumstances. That is what the submission of the Defendant here boils down to – the Defendant submits that it does not matter whether such a representation was made; the Government always retains the policy discretion to amend licence terms in the best interest of Canadians and owes no duty to even a limited class.

227. Put that baldly, this cannot be correct. It would mean that the Government could never owe a private law duty of care in respect of a representation, since whatever promise may have been made, such was automatically in law subject to the Government's overriding policy discretion and therefore, not actionable. That is clearly not the law, as is illustrated by well-established jurisprudence, which underscores that the Government can be liable, in appropriate circumstances, for negligence and/or negligent misrepresentation.

228. The submission of the Defendant is that the Government always has the discretion to exercise its regulatory function, if done in good faith, to meet its objectives to best serve the Canadian public. I accept that. What I cannot accept is the extension of the Defendant's same submission to the effect that good faith in the exercise of Government discretion effectively amounts to immunity from liability in negligence in all circumstances.

229. The Defendant submits that the Government made no representation that spectrum licences would be "freely tradable" including to an Incumbent after the five-year moratorium. It submits that all spectrum transfers are subject to Ministerial approval and that the Minister "clarified the basis for that approval" in implementing the *2013 Transfer Framework.*[105]

230. The Defendant submits that the Federal Court held in *TELUS Communications Company v. Attorney General of Canada*, 2014 FC 1157, at para. 49, that "the Minister had ample statutory authority to make the new framework and was not constrained by any alleged promises." It submits, in part, that as a result of this decision, the Plaintiffs are estopped from bringing this action and obtaining judgment.

231. In that case, TELUS brought an application for judicial review seeking declaratory and other relief challenging the authority and jurisdiction of the Minister with respect to the imposition of deemed transfer requirements as part of the *2013*

[105] Defendant's Preliminary Statement of Legal Principles, at para. 5.

Transfer Framework. TELUS, an incumbent, also participated in the 2008 AWS Spectrum Auction. TELUS was successful in acquiring certain licences. As an incumbent, it was ineligible to bid on the set-aside licences that were available only to new entrants such as Mobilicity.

232. However, in that application for judicial review, TELUS submitted that the Minister had made representations (i.e., the five-year moratorium representations) that led TELUS to believe that after the five-year period, it could pursue arrangements with one of the new entrants to acquire some or all their spectrum. TELUS explained that, in relying on this representation, it bid less aggressively than it otherwise might have on the spectrum available to it during the auction.

233. Justice Hughes specifically considered the term of the licences issued following the 2008 AWS Spectrum Auction that are at issue in this case, and which prohibited a transfer to a new entrant for a period of five years from the date of issuance. The court observed that the evidence supported the submission that TELUS was content to acquire less than it calculated that it would need in the future based on its confidence that after five years, it could acquire spectrum from the new entrants.

234. Justice Hughes found the evidence of TELUS to be inadequate, describing it as "scanty, [and] little more than a simple assertion made by their affiant … supported by a copy of some power point slides that he said he showed at an internal meeting within the TELUS organization": para. 7.

235. I note that while it was named as a respondent as required by r. 303 of the Federal Court Rules, SOR/98-106, because it would be affected by any decision, Mobilicity did not participate in that judicial review proceeding. Rogers Communications Inc. and Shaw Communications Inc. were the participating respondents.

236. In any event, the Plaintiffs in this action were not parties to the judicial review application in any capacity. It follows that the court in that application did not have the benefit of any submissions or evidence from either Mobilicity or these Plaintiffs, and no legal or factual issues as between the present Plaintiffs and the Defendant were determined.

237. Further still, that proceeding was not a claim for negligence in respect of which damages were sought. It was an application in which the applicant sought by way of relief a prerogative writ setting aside the *2013 Transfer Framework*.

238. Moreover, to the extent that Justice Hughes declined to grant relief in favour of TELUS because the evidence in the record was "scanty", such is clearly not the case here. The evidentiary record is fully developed.

239. The judicial review decision does not assist the Defendant as it submits that it should. Even if it were binding on the Plaintiffs and determinative of the claims for damages in this case, as I have observed above, the issue in the present case is not whether the Minister exceeded his jurisdiction in implementing the *2013 Transfer*

Framework. Rather, the issue is whether, in so implementing it, he ought to be immune from liability to the Plaintiffs for harm suffered as a result.

240. Expressed differently, whether or not the Federal Court decision amounts to an estoppel operating so as to prohibit the Plaintiffs from arguing that the Minister of Industry lacked jurisdiction to create and implement the *2013 Transfer Framework*, certainly no estoppel arises in respect of claims based on negligence (including negligent misrepresentation) regarding particular representations allegedly made by the Government to the Plaintiffs before Mobilicity was incorporated and/or before the spectrum licences were issued.

241. For completeness, I also note that in *TELUS Communications Company v. Attorney General of Canada*, 2014 FC 1, [2015] 2 F.C.R. 3, TELUS brought an application for judicial review seeking declaratory relief and an order of prohibition pursuant to s. 18.1(1) of the *Federal Courts Act*, R.S.C., 1985, c. F-7, in relation to the *Licensing Framework for Mobile Broadband Services 700 MHz Band* released by Industry Canada in March 2013. That framework established the rules for participation in the auction for spectrum in the 700 MHz band, including the conditions on licences that would apply.

242. TELUS brought that application on the basis that it was negatively affected by those conditions since the result of the auction process would be that TELUS, as a large wireless service provider (i.e., an Incumbent), would not be issued licences for more than one block of spectrum in certain blocks or segments. TELUS submitted that the conditions or decisions were in fact eligibility criteria that the Minister had no authority to apply, and therefore in doing so, the Minister exceeded his jurisdiction.

243. In dismissing the application, the Federal Court held that the Minister had the authority to impose terms and conditions on spectrum licences, and in doing so, the Minister did not impose eligibility requirements. As a result, the Minister was within his jurisdiction in implementing and furthering the objectives of telecommunications policy: at para. 96. The Federal Court went on to hold that the Minister is also authorized, when exercising his powers to issue radio licences, to impose terms and conditions on spectrum licences: at para. 89.

244. In my view, however, this decision also does not assist the Defendant. The Federal Court held in the TELUS case (2014 FC 1) that the Minister had the jurisdiction to impose conditions on spectrum licences. The Federal Court made no determination as to whether, by doing so, the Minister was immunized from liability to which the Government would otherwise be exposed. That issue was not before the Federal Court in that proceeding which was, as noted above, not a civil action in any event.

245. Where the Government owes a private law duty of care, nothing in the imposition of that duty prohibits or prevents the Government from subsequently changing its position. What the imposition of that duty does do, however, is impose a duty of care on the Government, owed to those to whom harm caused by its change of position was reasonably foreseeable.

246. Even if Industry Canada acted within the ambit of its statutory authority, its decision may still ground private law liability: see *TeleZone Inc. v. Canada (Attorney General)* (2007), 88 O.R. (3d) 173 (C.A.), at para. 83, aff'd 2008 ONCA 892, 94 O.R. (3d) 19, aff'd 2010 SCC 62, 327 D.L.R. (4th) 527, quoting with approval from *Wells v. Newfoundland*, [1999] 3 S.C.R. 199:

> As the Supreme Court of Canada noted in Wells v. Newfoundland, 1999 CanLII 657 (SCC), [1999] 3 S.C.R. 199, [1999] S.C.J. No. 50, at para. 41, there is a distinction between whether the Crown has the authority to take an action, and whether the Crown may escape the legal consequences of that action. A decision that is lawful in the sense that it had statutory authority may still constitute a breach of contract. *Wells* stands for the proposition that unless the Crown has explicitly precluded its [page 193] own liability, it is liable in private law like any other party. TeleZone's allegation that Industry Canada breached an implied contract to which they were parties is not an allegation that Industry Canada had no administrative authority for its action or a challenge to the legal validity of its decision. It is simply an allegation that by virtue of the Minister's actions -- administratively proper or otherwise -- the Crown is in breach of its private law contractual obligations.

247. The evidence overwhelmingly provided that these Plaintiffs, their investors (such as CI), and the market generally, understood that the licences were transferable to Incumbents after five years.

248. The Defendant knew this, as was acknowledged by multiple Government witnesses. If the licences were not to be transferable after five years, the Defendant had the duty to correct the Plaintiffs' understanding. It did not do so. The licence terms were to the effect that they could not be transferred to an Incumbent for five years from the date of issuance. The terms did not state that the licences might never be transferable if the Government so decided, even after the five-year moratorium. The Defendant submits that such is implicit.

249. I am not prepared to read such a term into the licences. To do so would be completely inconsistent with the factual matrix surrounding the licences and the auction from which they were issued, the representations made to the Plaintiffs, as well as other investors and licencees, and the Government's own understanding as reflected in its internal documents, all as described above.

250. The whole point of the five-year moratorium was to avoid the practice of "flipping" or short-term speculation specifically where investors capitalized licencees to buy spectrum at the auction only to resell it shortly thereafter, without ever having had any intention of capitalizing the licencee to build out the network of a new entrant

to compete with the incumbents, thereby thwarting the very policy objective that the Government sought to achieve.

251. That is not what the Plaintiffs here did. They were not short-term speculators. They invested, significantly and over time, to compete against the Incumbents. That was exactly what the Government was attempting to incentivize rational economic actors to do. The Government did not guarantee they would succeed. It did, however, represent that if they bought a licence at auction, and pursued the business in good faith for a minimum of five years, they would then be permitted to transfer that licence to an Incumbent if they could find a willing buyer.

252. The Government thwarted this by making the representations in 2006 - 2008 and then implementing the *2013 Transfer Framework*. The Government thwarted this again in 2014 by making public statements and planting media reports stating that it would not allow spectrum transfers to incumbents even after the five-year moratorium. Finally, in 2015, the Government thwarted this by interfering in the Mobilicity sales process.

The Second Anns/Cooper Stage: Are there Residual Policy Reasons for Declining to Impose a Duty?

253. The Court of Appeal stated in *Aylmer* that:

> [33] At the second stage of the *Anns/Cooper* analysis, the court determines whether there are residual policy reasons to decline to impose a duty of care on the governmental actor. A significant policy consideration is whether the imposition of negligence on the government actor would trigger a conflict with its public duty. As this court noted in *Williams v. Toronto (City),* 2016 ONCA 666, 133 O.R. (3d) 663, at paras. 65-66: "The negative policy consequences of such a conflict could provide a compelling reason for refusing to find proximity: *Syl Apps*, at para. 28; *Fullowka,* at para. 72".
>
> [34] However, in *Hill*, McLachlin C.J. cautioned that "policy concerns raised against imposing a duty of care must be more than speculative; a real potential for negative consequences must be apparent": at para. 48, because "a duty of care in tort law should not be denied on speculative grounds": at para. 43. It is not sufficient for the defendant to posit an abstract and only "potential conflict".
>
> [35] In *Hill*, McLachlin C.J. dismissed the argument that a conflict might arise between the officer's duty to prevent crime and a duty of care to the suspect, because the officer's public duty "is not to investigate in an unconstrained manner" but "in

> accordance with the law", including tort law: at para. 41. She pointed out that "police might become more careful in conducting investigations if a duty of care in tort is recognized", which she considered "not necessarily a bad thing": at para. 56. This thought is consistent with Cromwell J.'s observation in *Fullowka*, that imposing a duty of care on mining inspectors would complement their statutory duty, not conflict with it.
>
> [36] This is also the stage at which the court decides whether the government action at issue is a policy decision or an operational decision. As Brown J.A. noted in *Bowman v. Ontario*, 2022 ONCA 477, at para. 59: "at common law public authorities enjoy an immunity from suit for negligence for 'true policy decisions'".
>
> [37] The basic principle was expressed in *Just*: because "the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions", "[t]rue policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors": at pp. 1239-40.
>
> [38] The distinction between policy and operational decisions remains important but, as McLachlin C.J. noted in *Imperial Tobacco*, at para. 72, this "question of what constitutes a policy decision that is generally protected from negligence liability is a vexed one". There is no "stark dichotomy between two water-tight compartments – policy decisions and operational decisions", because "decisions in real life may not fall neatly into one category or the other": at para. 86.

254. Applying those principles to this case, I find that there are no residual policy reasons to decline to impose a duty of care on the Government.

255. None of the original Government representations made to the Plaintiffs and other licencees and investors, its decision to implement the *2013 Transfer Framework*, or its decision to obstruct the operation of its own *2013 Transfer Framewor*k to impose delay on a licencee and its stakeholders seeking a licence transfer constitute core policy decisions.

256. As noted above, nothing in the imposition of the duty of care restricts the ability of the Government to change its policy. Rather, it provides that if that policy change has the effect of breaching a representation made where a duty of care was owed, liability will follow.

257. I also reject the submission of the Defendant that the imposition of a duty in the particular facts of this case will have broad implications on the Government's ability to make laws or regulate a particular industry. As stated above, almost all of the circumstances here were unique and unusual:

- the specific policy objective of attracting new entrants into a niche, highly capital-intensive business;
- the recognition of the high cost of entry and the high risk of failure;
- the imposition of the commercial mechanism of an auction to sell a federal licence for hundreds of millions of dollars; and
- the efforts to incentivize new licencees and their investors and lenders by the mitigation of the commercial risk through the ability to sell the licence to an Incumbent after the moratorium.

258. This is not an "every day" or ordinary course situation such as to give rise to a "floodgates" argument if a duty of care is imposed. Fundamentally, there is no valid policy reason why a duty of care ought not to be imposed in these circumstances.

259. There is nothing ordinary or usual about Industry Canada's conduct. Even the Defendant describes certain of the relevant conduct by Industry Canada as "unusual".[106]

260. That conduct, and the consequences that flow from it, are discussed in detail below. For the purposes of this point, however, no reasonable argument can be made that the circumstances of this case are so "every day" as to support a floodgates argument. On the contrary, the conduct was profoundly irregular.

261. In particular:

- these Plaintiffs (and other licencees and investors therein) of which there are a very limited and discrete number, were specifically courted and encouraged;
- the universe of such individuals was extremely limited. It is a small cohort that was in a position to invest the significant capital necessary to successfully bid for the spectrum licences at auction, and then build out a wireless network;
- the conduct of the Government and its officials in 2013 in introducing and implementing the *2013 Transfer Framework*, which had the effect of amending the key attributes of the spectrum licences issued in the 2008 AWS auction was unique and affected this same small cohort of parties;

[106] Defendant's Closing Submissions, at paras. 504-505, in which the federal Government concedes that the decision to place an article in the Globe & Mail newspaper was "unusual but not unlawful."

- the conduct of the Government in 2014 in planting a story in the Globe & Mail was highly irregular and unusual;

- the conduct of the Government in 2014 in directly interfering with the Mobilicity *CCAA* proceeding, and particularly the court-ordered mediation, was highly irregular and unusual; and

- the conduct of the Government in 2015 in interfering with the auction of Mobilicity was also highly irregular and unusual.

262. Largely for those same reasons, I reject the submission of the Defendant that in the particular circumstances of this case, recognition of a duty of care should be refused because it would have a "chilling effect" on government action. As observed by the Court of Appeal in *Aylmer*:

> [59] Second, the trial judge did not give effect to *Hill* and similar authorities that reject the argument that recognition of a duty of care should be refused because it would have a "chilling effect" on government action: *Hill*, at paras. 56-58. In *Fullowka*, the Supreme Court rejected the Court of Appeal's assertion that "imposing a duty to carry out their public duties with reasonable care 'might cause [the regulators] to over-regulate or under-regulate in an abundance of caution'": at para. 73. In *Paradis Honey Ltd. v. Canada (Attorney General),* 2015 FCA 89, [2016] 1 F.C.R. 446, leave to appeal refused, [2015] S.C.C.A. No. 227, Stratas J.A. noted, at para. 98: "One can always speculate that recognizing a duty of care could have a chilling effect". He cautioned that: "Such a low standard would immunize government from liability in every case of bureaucratic ineptitude, no matter how substandard or damaging the misconduct may be". He concluded that: "No court anywhere has set the bar that low". See also, *Williams*, at paras. 66-67.

263. Here, there is no compelling evidence of any "chilling effect" even if such were sufficient to deny the existence of a duty of care. The evidence was to the opposite effect.

264. It was in 2013 when Industry Canada released the *2013 Transfer Framework* and Minister Paradis gave a press conference denying for the first time that the licences would generally be transferable to Incumbents after five years, that the market chilled. That chill came from what was broadly seen in the market and in the financial press as the Government going back on its word and retroactively changing the rules of the game. The chill did not come from the imposition of the duty of care in the first place; it was rooted in the breach of that duty.

265. For all these reasons, I am satisfied that Industry Canada owed a duty of care to the Plaintiffs.

266. While this matter was under reserve, counsel for the Plaintiffs drew to the attention of the court the recently released decision in *Metro Taxi Ltd. v. City of Ottawa*, 2024 ONSC 2725.

267. Counsel submitted that the decision was relevant to this case in standing for the proposition that a government could be liable in negligence for economic loss arising from a breach of the duty to regulate in a reasonable way. Particular reliance was placed upon paragraphs 100-115, 139-166, 170-182 and 194-233.

268. The Plaintiffs submitted that the decision could inform the analysis of reasonable foreseeability arising from the knowledge of negative impact on value (in that case, of taxi plates) and that proximity could arise from specific interactions outside the parameters of ordinary regulatory activity.

269. The Defendant submitted that the decision arose in the context of a class action alleging negligent by-law enforcement by the City of Ottawa against Uber, to the detriment of the taxi industry in Ottawa. The Defendant submitted that the case turned, at least in part, on the specific finding that the relationship between the City and the taxi industry was akin to a joint venture, and that in the absence of such factual findings, regulatory functions owed to the public as a whole do not support a duty of care.

270. That case, involving an issue of liability against a municipal (as opposed to a federal) government, represents an example of a case where the court declined to negate the duty of care for policy reasons, and was not persuaded that there was a risk of indeterminate liability.

271. However, in my view, the case does not change, in any material way relevant to the analysis in this case, the law regarding the circumstances in which a government can be liable in negligence or negligent misrepresentation as set out above.

Did the Defendant Breach the Standard of Care?

272. The Plaintiffs allege that Industry Canada is liable in negligence (and negligent misrepresentation) since:

a. it induced the Plaintiffs to invest hundreds of millions of dollars on the basis of representations that the licences issued to Mobilicity could be freely transferred to Incumbents after five years, subject effectively only to the requirement that the proposed transferee met Canadian eligibility requirements;

b. the Plaintiffs were relying on the representations and would not have invested but for those representations, and acquired the licences through the 2008 AWS Spectrum Auction on the basis of the represented transferability after the five-year moratorium; and

c. it breached its representations by prohibiting the Plaintiffs from transferring Mobilicity's licences to an incumbent after the five-year restriction expired through the implementation of the *2013 Transfer Framework*, and the interference in the efforts of Mobilicity to sell its licences in 2014 and again in 2015.

273. Having found that the Defendant owed the Plaintiffs a duty of care, I must consider whether Industry Canada breached the standard of care. The governing principles were summarized by the Court of Appeal in *Aylmer*, citing *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, and *Marchi*:

> [63] The standard of care in negligence is set by what a reasonable person would do in similar circumstances: *Hill,* at para. 69, *Nelson*, at para. 91. This rule applies to both private and governmental actors: *Nelson*, at para. 92, citing *Just*, at p. 1243. Perfection is not required. In *Hill*, for example, the applicable standard was that of a reasonable police officer. The standard of care accommodates the exercise of professional discretion, but this must "stay within the bounds of reasonableness" or "within the range of reasonableness". This is the margin of manoeuvre afforded to regulators. The standard of care also permits "minor errors or errors in judgment": *Hill*, at para. 73.
>
> [64] The elements to be taken into account in determining the standard of care include "the likelihood of known or foreseeable harm, the gravity of harm, the burden or cost which would be incurred to prevent the injury, external indicators of reasonable conduct (including professional standards) and statutory standards": *Hill*, at para. 70.
>
> [65] Put simply, the standard of care applicable to the Ministry and its officials is that of a reasonable health and food safety regulator. Ordinarily, expert evidence is required to prove a professional standard of care and any breach, but not always. Sometimes, as in this case, the plain facts are enough to meet the test of common sense: *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, per Brown J., at para. 2.

274. Applying those principles to this case, I am satisfied that the Defendant breached its duty of care owed to the Plaintiffs. The conduct of Industry Canada cannot be described as a minor error or an error of judgment – it was targeted, specific, and intentional. Nor in my view, is it within the range of reasonableness.

275. The Defendant breached its duty of care by:

a. unilaterally cancelling and revoking the right to transfer the spectrum licence to an Incumbent after the five-year moratorium, through the adoption and implementation of the *2013 Transfer Framework* and other actions, and by doing so in the manner in which it did, specifically targeting Mobilicity, and preventing the transfer of the spectrum licences to an Incumbent notwithstanding the expiry of the five-year moratorium; and

b. intentionally interfering with, and ultimately frustrating the efforts of Mobilicity to sell and transfer its spectrum licences in 2013, 2014 and 2015.

276. I will address these in turn.

The Unilateral Cancellation of Spectrum Licence Transferability

277. It is important to note, again, that at the time of the 2008 AWS Spectrum Auction, there were no restrictions on the transferability of spectrum licences beyond compliance with eligibility criteria and the stated conditions of licence.

278. In addition, and consistent therewith, Industry Canada had never refused a licence transfer where those two basic and objective elements were satisfied, including in circumstances where the licence was transferred from a new entrant to an Incumbent, and circumstances where the new entrant had obtained the licence through a so-called "beauty contest" rather than a spectrum auction.

279. This was confirmed by the evidence on discovery (read in at trial) of Gilfillan, who explained the extent or lack thereof of the analysis undertaken in respect of an application to transfer at the time of the 2008 AWS Spectrum Auction:

> Q. Okay. So the sentence says: "Departmental approval is required." So that obviously means the department is going to look at a transfer and approve it or not approve it, right?
>
> A. Yes.
>
> Q. Okay. And my question is: At the time of the auction in 2008, what was the department's understanding or view as to what the basis for that analysis would be?
>
> A. So eligibility to hold a license, and you know, that the conditions of license were being met, and that it -- you know, it was to eligibility under the set aside.
>
> Q. Okay. And that's it?
>
> A. Well, and Canadian ownership and control.
>
> Q. Okay. So Canadian ownership and control, eligibility under the set aside, and conditions of license?

A. And eligibility to hold a license under the Radiocom Act.

Q. Okay. And that's it?

A. And Radiocom regs, yes.

Q. Okay. And so the department's understanding, at least at the time of the auction in 2008, was that if somebody submitted an application for a transfer of the license, those, I think it was five things you just said to me, would be the basis on which that application would be reviewed?

A. Yes.

Q. And no others?

A. Not to my knowledge. I wasn't around at this time.[107]

…

Q. And so my question, to be clear then, is whether the Minister has, with respect to commercial spectrum, ever refused to approve a licence when all conditions have been met of licence, be there a cap or otherwise, and Canadian ownership has been met, has the Minister, notwithstanding the satisfaction of those conditions, refused to grant his or her approval to the transfer, as a matter of Ministerial discretion, to use your earlier reference to discretion, okay? That's my question.

A. So the way you worded the question, the answer would be zero.[108]

280. Hill testified to the same effect:

Q. Okay, sir, I want to just refer you to the fact that the Attorney General has admitted in this case that prior to 2008 no transfer request had ever been refused where eligibility and conditions of licence were satisfied.

A. And I don't dispute that...[109]

281. I find that there were no restrictions on the transferability of spectrum licences beyond compliance with eligibility criteria and the stated conditions of licence until the implementation of the *2013 Transfer Framework,* for all the reasons set out above.

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[107] Exhibit 74, Plaintiffs Brief of Read-Ins from Discovery Examination of Fiona Gilfillan and Peter Hill, at pp. 175-176.
[108] Exhibit 74, Plaintiffs Brief of Read-Ins from Discovery Examination of Fiona Gilfillan and Peter Hill, at p. 182.
[109] Cross-Examination of Peter Hill, December 14, 2023, Transcript, at p. 2672.

282. I have discussed above the clear basis upon which the licences were represented to have a ten-year term, and indeed an expectation of renewal. Beyond that, I have discussed how the *2013 Transfer Framework* introduced for the first time a myriad of factors that were not only subjective and significantly more expensive than the basic criteria applicable previously (i.e., Canadian ownership eligibility and good behaviour), but were difficult to understand, apply, and interpret.

283. Moreover, I note that the statement by the Defendant in its own Closing Submissions to the effect that the "[2013] Transfer Framework also amended the conditions of licence for all commercial mobile spectrum licences."[110] Indeed, it did.

284. I have further discussed the Government's own internal documents such as the Stewart electronic mail Memorandum discussed above, which in my view, represents in the words of the Government's own senior officials reporting to their Minister (and with which the Minister himself then agreed), what I have found to be the case:

- investors could be dissuaded from participating in future auctions due to what they would likely interpret as the "capricious actions of Industry Canada";

- the Government "ran an auction based on the expectation of a 5 year restriction on transfers of set-aside spectrum to Incumbents. Billions of dollars were spent under the assumption that these rules would be respected. A knee-jerk reaction to a specific situation is not a sound policy approach."[111]

285. The senior staff and the Minister were correct in what they said. The actions of the Government *were* capricious, and they *were* inconsistent with the expectations which were in turn based on the representations made. Those representations were relied on by the investors who, as noted, *did* spend billions of dollars under the assumption that the rules would be respected. The knee-jerk reaction was not only inconsistent with sound policy but, as noted, it was not a general policy at all. Rather, it was a reaction to a specific situation targeted against a specific company, and that, also, is actionable.

286. In short, the Government promised the Plaintiffs that if they invested in the spectrum licences and complied with their obligations, the licences would be valid for ten years and probably longer, and if the business was not working out, the downside risk to the investors was mitigated by the fact that the licences would be transferable to Incumbents.

287. The Plaintiffs relied on this promise. They paid $243 million for the spectrum licences. They spent millions more building out the network. There is no issue in this

[110] Defendant's Closing Submissions, at para. 226.
[111] Exhibit 54, Email from H. McDonald to K. Gillis, and Others, November 9, 2012.

case that the Plaintiffs performed their part of the bargain in good faith and built out the network as intended.

288. The *quid pro quo* was that while the Government made these promises, it required assurance that those who acquired spectrum licences at auctions were not merely speculators attempting a "quick flip", bidding for the licences with a view to immediately transferring them to one of the incumbents.

289. The Incumbents certainly wanted the licences, this is precisely why they were 'set-aside'. According to the auction terms, the Incumbents were ineligible to bid on them. So, the *quid pro quo*, or the balancing of the need of the Government to avoid speculators as against the need of investors to mitigate the risk with an exit strategy of being able to sell the licences for which they paid such significant amounts, was a five-year moratorium. More simply put: 'yes, you can sell your licences to an Incumbent, but you need to make a good faith effort to build out a network and attempt to succeed, so while you can sell to an Incumbent, you cannot do so for five years.' That was the promise.

290. At its core, but inescapably, the implementation of the *2013 Transfer Framework* breached that promise.

The Defendant's Interference with Mobilicity's Efforts to Sell its Spectrum Licences

291. The actionable conduct on the part of Industry Canada began with the implementation of the *2013 Transfer Framework* but also continued thereafter.

292. In addition to inducing the Plaintiffs to invest based on representations of transferability after five years and then implementing the *2013 Transfer Framework* which unilaterally removed that ability to transfer to an Incumbent, the Government frustrated Mobilicity's efforts to sell and facilitate licence transfers, even after the *2013 Transfer Framework* took effect.

293. The immediate effect of the *2013 Transfer Framework* was to devalue the investment of the Plaintiffs in Mobilicity. The company was immediately unable to attract investment capital to fund operations. It hired a restructuring officer in an attempt to identify and develop options and conduct a sales process. Later that year, Mobilicity commenced insolvency proceedings and sought protection from its creditors.

294. The most relevant events are discussed below.

The Effect of the 2013 Transfer Framework and the 2013 Efforts to Sell Mobilicity

295. In May 2013, Mobilicity entered into an agreement for TELUS to acquire its business including its spectrum licences pursuant to a transaction valued at $380

million. Industry Canada blocked this transaction on the basis that it was not consistent with the *2013 Transfer Framework* conditions prohibiting transfers to Incumbents.[112]

296. Upon entering into the agreement, the parties requested that Industry Canada waive the five-year moratorium on licence transferability (that would not expire for approximately another month). By correspondence dated June 4, 2013, Hill, on behalf of Industry Canada, wrote to confirm that the requirement would not be waived. The result was that the TELUS transaction could not proceed.[113]

297. That same day, the Minister of Industry, Christian Paradis, gave a news conference and made specific reference to the rejection by the department of the TELUS offer to purchase Mobilicity. The Minister reaffirmed what Hill had stated in the correspondence: Industry Canada would not approve that or any other transfer of set-aside spectrum to incumbents within the five-year moratorium.

298. I accept and agree with the Plaintiffs' submission that had the comments of the Minister ended there, they would have been unobjectionable. However, Minister Paradis went further and announced that the new transfer framework (e.g., the *2013 Transfer Framework*) would be implemented in the coming weeks and that it was intended to "send a strong and firm and clear signal that all proposed spectrum transfer, including specifically the 2008 AWS spectrum set aside for new entrants, that results in undue spectrum concentration and therefore diminished competition will not be permitted".[114]

299. By so doing, the Government fundamentally amended the terms of the licences and caused a material and immediate devaluation of the value of Mobilicity's licences. Now, and for the first time, the licences could not be transferred to an Incumbent after the five-year moratorium even if the basic eligibility requirements were met. Instead, the Government would consider whether to deny such a transfer if it determined that the transfer might result in spectrum concentration.

300. The speech represented the effort of the Government to do politically what it had just been told by its most senior advisors (see above-noted electronic mail Memorandum to Stewart) that it could not do lawfully: unilaterally change the licence transferability terms.

301. The market reaction was immediate. Financial analyst reports and commentary on the effect of the removal of the licence transferability reflected both the fact that transferability to an Incumbent after five years had always been clearly understood (by Mobilicity, the Plaintiffs, the market, and the Government) as a licence term, and the

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[112] Examination-in-Chief of John Bitove, November 30, 2023, Transcript, at p. 398.
[113] Exhibit 6, Brief of Documents Prepared for William Elias Aziz, Letter dated June 4, 2013 from Industry Canada.
[114] Exhibit 52, Vol. 1., Witness Brief of Documents for Kelly Gillis, Tab 24, Transcript – Minister of Industry Christian Paradis – News Conference – June 4, 2013.

fact that the removal of this term would be devastating for Mobilicity and immediately so.

302. Dvai Ghose, Managing Director, Head of Research at Canaccord Genuity Corp., wrote in an analyst email communication dated June 4, 2013 the following, in a prescient and accurate prediction of the direct result of the actions of the Government would be:

> What Paradis has never addressed is how the independent new entrants are expected to survive without incremental funding. It now seems inevitable that Mobilicity will go bankrupt and Public Mobile may follow. More importantly, if new entrants are not allowed to be sold to the only obvious buyers – the incumbents – we wonder why investors would want to fund the independent new entrants.[115]

303. Jeff Fan, Managing Director, Equity Research Analyst, Telecom and Media at Scotiabank wrote a similarly stark analysis of the effect of the Government's actions, and their effect on the parties who would later be the Plaintiffs in this action in particular. In an email dated June 4, 2013, he stated that Industry Canada had effectively devalued Mobilicity. Moreover, he noted that if sales to Incumbents were not permitted (the five-year moratorium having expired), "Mobilicity's bondholders must decide whether to support the company or seek a non-incumbent buyer at depressed prices".[116]

304. Last, Tim Casey from BMO Capital Markets observed the same impact on the Plaintiffs as well as the possibility of this very action when he wrote in a report titled "Wireless Policy in Canada: Searching for a Silk Purse in a Sow's Ear", dated June 20, 2013 that was attached to an email from Dawn Hunt, Vice President, Regulatory at Rogers, to Hill and Heather Hall, Director, Auction Policy and Economic Research at Industry Canada, who then subsequently forwarded the report to Gilfillan on June 22, 2013:

> Financial backers of the three new entrants made their investments with an exit strategy if commercial operations stalled: selling to the incumbents in five years. The Minister's denial of the TELUS-Mobilicity deal, and his opaque language regarding other sales of AWS spectrum to incumbents (Rogers/Shaw and Rogers/Videotron) may open up legal recourse. The government accepted investors' capital on the way in, but may have changed the rules four years later.

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[115] Exhibit 48, Cross Examination Brief Prepared for Peter Hill, Tab 28, Internal Email Attaching Finance Analysts' Commentaries to the Minister's Decision to Deny Telus' Bid for Mobilicity.

[116] Exhibit 48, Cross Examination Brief Prepared for Peter Hill, Tab 28, Internal Email Attaching Finance Analysts' Commentaries to the Minister's Decision to Deny Telus' Bid for Mobilicity.

> It isn't exactly an ideal precedent to have hanging out there when you're trying to attract a billion or two of capital, again, to finance the fourth player. [117]

305. The Government submits that these analyst reports are of no moment because they are simply reports and opinions of third parties. It relies on the evidence of Hill to the effect that "we don't police what people write in the papers or what they write in their own analyst reports".[118] I reject this submission. The analyst reports were entirely consistent with the Government's own representations, the reliance on those representations by the Plaintiffs, and the Government's own subsequent internal interpretation of the promises it had made.[119]

306. Then, as noted above, the *2013 Transfer Framework* was released on June 28, 2013. Also, as noted above, and as forecasted in Minister Paradis' speech, it replaced the clear, simple, and objective standards for assessing proposed licence transfers, with a new markedly more complex and discretionary framework.

307. Regarding the *2013 Transfer Framework*, Huber testified the following:

> Q. If the transferability guidelines or the factors identified in the 2013 framework were the criteria or considerations or factors identified in 2007, would you have recommended an investment in Mobilicity and participating in the auction?
>
> A. Absolutely not.
>
> Q. Why not?
>
> A. The list of items in paragraph 40 are --
>
> Q. Paragraph 40 of the 2013 framework?
>
> A. The 2013 framework, right.
>
> Q. Yes.
>
> A. -- subjective. Frankly, a number of them are, I would say, meaningless and almost amateurish in terms of how they're written. I don't understand what they mean. I don't think anyone understands what they mean. I have no idea of how to assess whether I comply with them, whether a transferee would comply with them. And then the last item, item H, is this sort of catch-all

[117] Exhibit 48, Cross Examination Brief Prepared for Peter Hill, Tab 28, Internal Email Attaching Finance Analysts' Commentaries to the Minister's Decision to Deny Telus' Bid for Mobilicity.
[118] Cross-Examination of Peter Hill, December 14, 2023, Transcript, at pp.. 2612-2613.
[119] See paras. 217 and 279 above.

> of in case this wasn't impossible to interpret, we are going to actually explicitly make it entirely subjective.
>
> ...
>
> Q. What, sir, in your view, did this list of criteria and considerations do to the enhanced transferability attributes of the licence that we saw referred to in the 2007 documents?
>
> A. It decimated them. It voided them and replaced them with something which was unrecognizable.[120]

308. Bitove stated that he was "enraged" by the *2013 Transfer Framework.* He explained that it equated to a "massive destruction" in value and essentially "poisoned" Mobilicity from incumbent acquisition. Regarding the impact of the change in the transferability term, Bitove said:

> Q. How did you read this in terms of its impact on transferability of spectrum licences, particularly among new entrants like you?
>
> A. It made it all subjective and it put everything into question in terms of what we had done and how we had got there and what the government had told us.
>
> Q. And your view as to the impact on Mobilicity was?
>
> A. As I said, it was a massive destruction in value in terms of what our, what the spectrum that we thought we had purchased going in.
>
> Q. And, Mr. Bitove, if at the time you made the decision to participate in the auction, and to put your money forth, if these had been the conditions that you knew would govern the transfers of the licence, would you have made that investment into purchasing the spectrum licences and building out Mobilicity?
>
> A. Not a chance. I wouldn't have put out money and I wouldn't have been able to raise any money.
>
> Q. Why do you say that?
>
> A. Because (A) there's a lot of subjectivity; (B) they're starting to put in, throwing things in here that have never appeared before

[120] Examination-in-Chief of Michael Huber, December 5, 2023, Transcript, at pp. 1053, 1057.

that were clearly inhibiting the Bell, Telus, and Rogers from trying or wanting to purchase the spectrum.[121]

309. Lyons additionally testified about his reaction to the *2013 Transfer Framework*:

> Q. And what was your reaction when you read this list of factors?
>
> A. I really couldn't believe it. Here we were in 2013 having raised hundreds and millions of dollars, putting my reputation on the line and John's, everyone else. We built the business, hired hundreds of people. We had hundreds of thousands of subscribers. We had done all of this work, and the government came out with this stuff, which was really ridiculous, and it killed our ability to raise capital. The business was effectively over at that point. It was ridiculous, highly ridiculous.
>
> Q. And, Mr. Lyons, if these had been the rules in 2008, would DAVE have invested?
>
> A. No.
>
> Q. Why not?
>
> A. Other than I just said they were ridiculous, but, no, they -- just there's no certainty here at all, there's no certainty about ever being able -- let alone five years, there's no certainty you could sell it to an incumbent. There's no liquidity, there's no nothing. No business here at all.
>
> Q. If the government had said it might have changed the transferability rules in 2008, would DAVE have invested?
>
> A. No.
>
> Q. Why not?
>
> A. Same reason. You need certainty. It's not a small thing. It was not a trivial undertaking, and this was not the kind of thing where you could have any wiggle room. You needed certainty. You needed to understand when you could acquire spectrum, when you could sell it, what the rules are. You just can't do stuff like this.[122]

310. Finally, McSweeney was clear that this was inconsistent with his expectations. He agreed with the observation of the analysts in the reports referenced above that the

[121] Examination-in-Chief of John Bitove, November 30, Transcript, at pp. 382-383.
[122] Examination-in-Chief of Stewart Lyons, December 4, 2023, Transcript, at pp. 823-824.

effect of the *2013 Transfer Framework* was to remove the well-funded buyers, the incumbents, as potential bidders:

> Q. So a number of the analyst report[s] indicate that the Minister speech devalued Mobilicity. Do you recall?
>
> A. Sure, yes.
>
> Q. Did you agree with that?
>
> A. The entire process, absolutely. Clearly. The -- clearly, I mean from an economics perspective removing well-funded buyers from the pool of potential buyers for an asset is all things being equal, always going to reduce a price.
>
> Q. And what was the strength of having removed well-funded buyers being incumbents, were there others funded who could buy this spectrum licence?
>
> A. Throughout, and you know, others would be more familiar whether it be the financial advisors and perhaps the shareholders or perhaps Mr. Aziz, the restructuring officer were more directly engaged in that.
>
> But I can tell you that the number of people that were liaising with -- I was part of an ad hoc noteholders committee -- the number of people that were engaging were not as well capitalized, not as well-funded and less likely to provide full value as indicated by, you know, some bids that we thought were well below what the market would bear in a more open auction.[123]

311. McSweeney additionally testified that his intent during the discussions with Hill "was on the transferability of the spectrum in the event of distress", namely, "both a reorganized Mobilicity in which perhaps bondholders were equitized or [there had] been a transfer of the spectrum to somebody who would allow us to realize the value."[124]

312. This resulted in the 2013 judicial review application by TELUS discussed above.

313. It further resulted in the inevitable insolvency of Mobilicity. The $380 million acquisition by TELUS had been the lifeline for Mobilicity, and the exit strategy for the investors and shareholders in Mobilicity (e.g., the Plaintiffs).

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[123] Examination-in-Chief of Kevin McSweeney, December 6, 2023, Transcript, at pp. 1450-1451.
[124] Cross-Examination of Kevin McSweeney, December 7, 2023, Transcript, at p. 1472.

314. The Government, having made it clear that it would not approve a transfer to TELUS just prior to, or after, the expiry of the five-year moratorium, left Mobilicity without any financial alternatives.

Mobilicity's Efforts to Restructure and Its Insolvency Proceeding

315. William Aziz ("Aziz") was hired as Chief Restructuring Officer of Mobilicity in April 2013. His initial mandate was to explore strategic alternatives for Mobilicity, which was by this time struggling. His evidence at trial was that the company was "treading water" (financially), and he was helping to "steer a sales process" by selling the shares of the holding company or the AWS spectrum.[125]

316. I recognize and have considered, as noted above, the fact that there was evidence to the effect that, as the Defendant submits, the "startup nature of Mobilicity's business meant that there was an execution risk in establishing business operations (...) [a]s , it happened, numerous events between 2010-2013 – not attributable to Canada and not claimed as against Canada – caused Mobilicity to experience poorer outcomes than it hoped for".[126]

317. There were issues of coverage and evidence regarding the pros and cons of Mobilicity's initial business plan to offer a simple flat rate "all-you-can-eat" talk-and-text plan for subscribers. There was also evidence of technical issues, network performance challenges, and the requirement for additional capital. This was acknowledged by all the Plaintiffs' key fact witnesses: Bitove, Lyons, and Huber.

318. I have considered all of that. All of it was foreseeable and acknowledged as an accepted risk. None of it, however, affects the fact that the core claim relates to the promise of transferability of the spectrum licences to an Incumbent if indeed, these challenges became insurmountable.

319. The evidence of Bitove, who was the most optimistic, was to the effect that in his view, selling the spectrum would not solve the problems because of the five-year moratorium, and that this was why the company had explored alternative options to restructure prior to considering insolvency proceedings (i.e., a merger with Wind Mobile ("Wind") or additional bridge financing). Some sort of transaction with Wind was considered even after Aziz had been appointed to assist with restructuring efforts in the fall of 2013.[127]

320. Huber on behalf of Quadrangle, was more concerned. He described the company in 2013 as "being on life support." And, importantly, needing "to have the full range of alternatives that [they had] had from the beginning" to raise capital.[128] He testified at

[125] Examination-in-Chief of William Aziz, December 1, 2023, Transcript, at p. 524.
[126] Defendant's Closing Submissions, at para. 178.
[127] Examination-in-Chief of John Bitove, November 30, 2023, Transcript, at pp. 384-385; Examination-in-Chief of John Bitove, November 30, 2023, Transcript, at p. 406.
[128] Examination-in-Chief of Michael Huber, December 5, 2023, Transcript, at p. 1108.

length about the profound negative impact caused by the *2013 Transfer Framework* and how it removed options for capitalization.[129]

321. For his part, Aziz gave evidence about the impact of the refusal by Industry Canada to waive the five-year moratorium requirement (which, at that point only had a few months left to run anyway). The result was for management to continue to operate the company with a cash preservation intent to keep it alive for an eventual sale but since at that time there was only the one bid (the March 2013 bid from TELUS), another path forward had to be found.[130]

322. Further, as Aziz noted, neither the proposed transaction with Wind nor any possible merger or other type of transaction with another new entrant was particularly attractive. Ironically, for the very reason that the moratorium had been imposed in the first place – the Incumbents were the only viable purchasers since the other new entrants were, in the words of Aziz, "losing as much or more money than Mobilicity was at the time" and were struggling to get financing as well.[131] He gave evidence about discussions (which never materialized into a transaction) with Wind, Québecor and others, but that "none of them were in a position to actually buy".[132]

323. The result was that no viable alternative was identified. By September 2013, Mobilicity was insolvent and had exhausted all options and alternatives. It sought creditor protection under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 ("*CCAA*").[133]

324. As is common in Canadian insolvency proceedings brought pursuant to the *CCAA*, the Initial Order granted by the court stayed all proceedings against Mobilicity and its officers and directors. In the Endorsement dated September 30, 2013 setting out the reasons for the granting of the Initial Order (2013 ONSC 6167), the court noted that Mobilicity had met the statutory requirements for creditor protection. Among other things, Mobilicity was insolvent and unable to meet its financial obligations as they came due. The court also noted that:

- the single most significant capital expenditure made by Mobilicity was the acquisition of its 10 spectrum licences from the Government of Canada. Mobilicity acquired the spectrum licences for $243 million using funds contributed by [DAVE Holdings]: at para. 8;

- after purchasing the spectrum licences, Mobilicity incurred significant costs by establishing an office, hiring a management team to develop the wireless carrier business, and contracting (...) to build a network system: at para. 9;

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[129] Examination-in-Chief of Michael Huber, December 5, 2023, Transcript, at pp.
[130] Examination-in-Chief of William Aziz, December 1, 2023, Transcript, at p. 532.
[131] Examination-in-Chief of William Aziz, December 1, 2023, Transcript, at p. 537.
[132] Examination-in-Chief of William Aziz, December 1, 2023, Transcript, at p. 537.
[133] Examination-in-Chief of William Aziz, December 1, 2023, Transcript, at pp. 524-525, 543.

- the Mobilicity Group proposed alternative plans of arrangement earlier this year. During the course of those proceedings, a transaction was agreed to sell the Mobilicity Group to TELUS Corporation for $380 million pursuant to a plan of arrangement under the *Canada Business Corporations Act*. The plan of arrangement was approved on May 28, 2013. However, on June 4, 2013, the Minister of Industry announced that TELUS Corporation's application to transfer the spectrum licences would not be approved at that time. Accordingly, the TELUS transaction was not completed: at para. 18.

325. In circumstances where, during a *CCAA* restructuring, it becomes apparent that a going-concern outcome is not possible or at least unlikely, the supervising *CCAA* court may direct a sales process, under the direction of the court-appointed Monitor and with the assistance and direction of the Chief Restructuring Officer, to solicit bids for all or part of the business and assets of the debtor company.

326. In November 2013, the *CCAA* court ordered such a sales process in the Mobilicity *CCAA* proceedings.

327. It was against the context of that pending sales process that Hill confirmed again the fact that Industry Canada fully appreciated the time sensitivity for licence transfer applications, particularly within the context of an insolvency proceeding. *CCAA* restructurings are classic examples of what has been referred to colloquially as "real-time litigation". It is axiomatic that all stakeholders, including the debtor company (Mobilicity), the Monitor, and all potential bidders needed certainty as to whether any bid was capable of being successful (i.e., would result in a favourable and immediate approval of the spectrum licence transfers):

> We understand that time is of the essence in these *CCAA* proceedings. Industry Canada is committed to moving expeditiously to give you the regulatory assistance you may require to complete your assessments of the potential purchasers. I will remain your point of contact going forward.[134]

328. However, Industry Canada continued its previous course of action by doing just the opposite.

The 2014 Interference with the Sale of Mobilicity

329. In February 2014 and given the refusal some months earlier in 2013 by Industry Canada to grant approval for the TELUS transaction, Mobilicity proposed to ask the court to compel a transfer of its spectrum licences to TELUS under s. 11.3 of the *CCAA*.

330. Section 11.3 permits a supervising *CCAA* court to assign, in certain circumstances, a contract to which the debtor is a party to another party who agrees to accept the assignment. The court may make an order assigning an agreement, with or

[134] Exhibit 53, Letter from Peter Hill to William Aziz dated January 21, 2014.

without the consent of the counterparty (in this case, the Government), having considered whether the Monitor approved the proposed assignment, whether the proposed assignee would be able to perform the obligations, and whether it would be appropriate to assign the rights to that party.

331. Mobilicity and Aziz, as CRO, considered recourse to this statutory provision given the criticality of the ability to transfer spectrum licences to an Incumbent, and the refusal of the Government to permit such transfers, as demonstrated by the implementation of the *2013 Transfer Framework*, the public comments by Minister Paradis about the specific objectives and intentions of the Government, and by the refusal to approve the TELUS transaction.

332. Notwithstanding this *CCAA* provision and the legislatively mandated factors to be considered by the court in determining whether to approve such an assignment, Industry Canada considered even the possibility of a compelled assignment by a court to be an attack on its unfettered authority to determine when, how, and on what terms spectrum licences could be transferred.

333. Industry Canada perceived Mobilicity's proposed s. 11.3 motion and the exercise of a *CCAA* court's jurisdiction as an effort to "overrule" its authority and that of the Minister, as confirmed on cross-examination by Gillis:

> Q. So what you understood in May 12 of 2014, and what the department understood was a request was being made of the CCAA court to order or direct a transfer of the licence, right?
>
> A. Correct.
>
> Q. And the department or Industry Canada considered that to be an inappropriate exercise of court power, right?
>
> A. Correct.[135]

334. Further, Nicholson concurred with Gillis in his own evidence:

> Q. And you were aware that Mobilicity had filed for creditor protection in September of 2013?
>
> A. Yes.
>
> Q. And there was discussion you were also aware of about use of the Companies' Creditors Arrangement Act, the CCAA, to facilitate or to direct a transfer of Mobilicity's licence to Telus, right?

[135] Cross-Examination of Kelly Gillis, December 20, 2023, Transcript, at p. 3319.

A. Yes, yes.

Q. And we heard from Ms. Gillis a couple of days ago that the Minister was very unhappy about that prospect; do you remember that?

A. Yes.

Q. Okay. And Ms. Gillis' testimony was that the Minister felt that the CCAA process and the CCAA court was overruling the authority of the Minister to deal with licences; do you remember the Minister having that concern?

A. Concern that they could potentially do that, yes.

Q. Right. And you shared that concern?

A. Yes.

Q. And you felt that the court should not be involving itself in spectrum transfer issues and approval of transactions involving wireless carriers; that was your strong view, correct?

A. My view was that that was a ministerial power outlined in the statutes and that the Minister is the one with the statutory authority to do that.

Q. And it was a strong view?

A. Yes.

Q. It was a strong view of your bosses?

A. Yes.[136]

335. One might have expected that the result in the circumstances would be that Industry Canada would vigourously oppose any compelled assignment pursuant to s. 11.3 of the *CCAA* by responding to the motion and making submissions to the *CCAA* court accordingly to the effect that the motion should be dismissed.

336. That, however, is not what occurred.

337. Instead, and following the January 22, 2014 *CCAA* order authorizing Mobilicity to bring a s. 11.3 motion "for an order assigning the rights and obligations of Mobilicity under the Mobilicity Spectrum Licences to a purchaser" and authorizing Mobilicity and

[136] Cross-Examination of James Nicholson, December 21, 2023, Transcript, pp. 3597-3598.

its Chief Restructuring Officer "to take all steps and actions, if necessary, with respect to the" s. 11.3 motion, Industry Canada launched a media campaign targeted specifically at Mobilicity and TELUS, threatening and intimidating TELUS in an effort to force it to withdraw its offer for Mobilicity.[137] The withdrawal of the offer would naturally render the proposed motion moot. TELUS was the proposed assignee. If it was pressured to withdraw, there was no assignment to approve.

338. On April 23, 2014, to explore the possibility of a consensual resolution of what was clearly going to be a contested motion brought pursuant to s. 11.3 of the *CCAA*, and in the face of rapidly escalating circumstances, the supervising *CCAA* judge, Newbould J., ordered Mobilicity and Industry Canada to participate in a mediation regarding the proposed TELUS transaction before The Honourable Warren Winkler, former Chief Justice of Ontario.

339. At this point in time, and as the insolvency proceeding of Mobilicity was well advanced, the proposed TELUS transaction was the only viable solution for Mobilicity and its stakeholders. Justice Newbould wanted the parties to explore the possibility of a consensual resolution by which the TELUS transaction might be completed to the satisfaction of all parties.

340. However, instead of participating in the mediation in good faith or opposing the proposed motion if the mediation was unsuccessful, the Government redoubled its efforts to interfere with any transfer of the Mobilicity spectrum licences to TELUS, whether pursuant to a consensual mediation or court order.

341. Beginning within two days of the mediation order dated April 23, 2014, the Government initiated an effort specifically and intentionally directed towards intimidating TELUS, and by extension the other Incumbents who would be bidders for the Mobilicity spectrum licences from pursuing the Mobilicity licences in any way.

342. The campaign did not involve only bureaucrats from Industry Canada, but also directly involved officials from the Prime Minister's Office ("PMO") and the Office of the Minister of Industry.

343. Ministry employees, together with senior political personnel from the Minister's Office such as Nicholson and Jessica Fletcher, the Minister's Director of Communications ("Fletcher"), strategically leaked a story to the Globe & Mail national newspaper. The purpose of the manufactured and planted story, attributed to an anonymous "senior government official", was to threaten TELUS and any other incumbent bidder for Mobilicity and its spectrum licences.

344. The threat was clear: if TELUS or either of the other two Incumbents continued to pursue the Mobilicity spectrum licences, the Government would exclude them from the then upcoming 2500 MHz spectrum auction, which, to the knowledge of the Government, was critical to TELUS.

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[137] Motion Record, CCAA Section 11.3, Order of Newbould J.

345. I pause to note an important fact. At this point in time the five-year moratorium on the transfer of the Mobilicity licences to an incumbent had expired. The Mobilicity licences were issued in February 2009. The moratorium expired in February 2014.

346. As such, the licences were, according to their terms in the representations made (all as set out above) eligible to be transferred to an Incumbent. Moreover, by April 2014, the circumstances facing Mobilicity were precisely those the Government and all the bidders considered at the time of the 2008 AWS Spectrum Auction when the five-year moratorium was imposed: specifically, the ability to mitigate downside risk in the event of financial or operational failure. If the licencee and its investors needed an exit strategy because it was experiencing financial challenges, it could sell its licences to the obvious constituency of purchasers, the Incumbents.

347. The precise scenario that in 2008 had been hypothetical but very clearly foreseen, had now come to pass.

348. The Government campaign advanced the narrative that its actions were to foster more competition in the wireless industry and that the Mobilicity/TELUS deal would "undermine the entire set-aside spectrum balance."[138]

349. To advance that narrative, Industry Canada, and Fletcher on behalf of the Minister of Industry provided directly to the Globe & Mail columnist who was authoring the article (Steven Chase, Senior Parliamentary Reporter) the following proposed (manufactured) quotes, specifically and directly planted by the Government and purported to be from an unnamed "senior government official":

> 1. If TELUS doesn't drop efforts to acquire spectrum set aside for new entrants, the Harper government is prepared to change the rules of the upcoming wireless auction that could effectively bar TELUS or any incumbent from acquiring that spectrum.
>
> 2. We've tried to be crystal clear that we will not allow spectrum in the hands of the incumbents when it decreases competition in the wireless sector. The incumbents don't get it. If companies like TELUS persist in trying to stockpile AWS spectrum, we will be forced to change the rules of the 2500 MHz auction so that more spectrum will go to new entrants and consumers benefit.
>
> 3. The incumbents are playing a dangerous game. The government has been consistent in its commitment to see a fourth wireless player in every region of Canada. If

[138] Exhibit 59, Brief of Documents Prepared for James Nicholson, Tab 27, Email outlining response to Telus' proposal and possibility of introducing new rules to bar incumbents from acquiring further spectrum.

> companies like TELUS think the government will allow them to stockpile spectrum that was set aside for a fourth player, and access new spectrum in future spectrum auctions, they are kidding themselves.
>
> 4. The rules of the 2500 MHz auction were designed so that AWS spectrum for new entrants would remain in the hands of new entrants. If that changes, we'll need to go back to the drawing board of the 2500 MHz auction rules. TELUS should reflect on that.
>
> 5. TELUS insists on testing the government's resolve when it comes to increased competition. We made a commitment to voters and will do what is necessary to see that through.[139]

350. Precisely as orchestrated by the Government, the Globe & Mail published an article on April 25, 2014 titled "Ottawa Threatens to Cut Telus Out of Wireless Auction". The article included all the above supplied quotes, and began with the opening sentences:

> [t]he Conservative government is prepared to cut TELUS Corp. out of a valuable auction of cellular frequencies if the big wireless player doesn't abandon repeated attempts to acquire spectrum that was set aside for new entrants, government sources say. This warning of unprecedented action is evidence tensions between the federal government and major telecom players are nearing a breaking point.[140]

351. Nicholson confirmed on cross-examination that the purpose of the article (i.e., the objective of the Government in planting it) was to target TELUS and send a message to the other Incumbents of the "broader implications" of acquiring new entrants like Mobilicity.[141]

352. The evidence of Nicholson was that he knew the message would have a significant impact, with direct implications for Mobilicity and its investors.[142]

353. Indeed, Nicholson was clear that the article was part of a direct and intentional campaign to "ratchet up the pressure" on TELUS. He was equally clear that he was discussing directly with the PMO what additional options were available to "ratchet up

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[139] Exhibit 59, Brief of Documents Prepared for James Nicholson, Tab 27, Email outlining response to Telus' proposal and possibility of introducing new rules to bar incumbents from acquiring further spectrum.
[140] Exhibit 1, Joint Brief of Documents, Section 268, Ottawa Threatens to cut Telus out of wireless auction Globe & Mail article dated April 25, 2014.
[141] Cross-Examination of James Nicholson, December 21, 2023, Transcript, pp. 3631-3632.
[142] Cross-Examination of James Nicholson, December 21, 2023, Transcript, pp. 3631-3632.

that pressure", and one of those options was engaging a parliamentary reporter to seed the story in the Globe & Mail.[143]

354. That is precisely what the Government did. Nicholson testified that to orchestrate all of this, he engaged in direct discussions about these options with the PMO. He reached out to Mr. Alykhan Velshi in the PMO since, as he agreed in his evidence, "when the Prime Minister's Office contacts a parliamentary reporter, they pay attention."[144]

355. In fact, according to Nicholson, Velshi himself came up with the idea of creating a story with a parliamentary reporter for national media with which he (Nicholson) went along.

356. That alone reveals how far removed these actions were from ordinary course spectrum policy management implemented by the Industry Canada officials managing spectrum in Canada.

357. As recorded in an electronic mail communication from Velshi to Nicholson, and copied to Fletcher and Jake Enright at Industry Canada, Velshi spoke to Steve Chase (the Parliamentary Reporter at the Globe & Mail). The email confirms that Chase had "agreed to everything in principle and is comfortable with the angle we discussed". Not only did the Government plant the manufactured story, but Chase also even proposed a target publication date.[145]

358. The chain of electronic mail messages that follows is further telling. Mr. Phil Harwood of the PMO suggested the addition of additional references to "the big incumbents" Specifically, "to ensure that Rogers also gets the message. They are playing the same game with Shaw." Nicholson himself then weighed in again with additional proposed revisions to the purported quotes from "unnamed government sources". In his email to the group, Nicholson stated in proposing his revisions that he:

> would want to walk the line in providing direct quotes more carefully between matter-of-fact statements about spectrum availability for new entrants and directly implicating that this is targeted squarely at TELUS, given that we may want later [to] pivot this to a broader policy decision and have it be about new entrants and more competition, *rather than taking down one company (TELUS) in particular*.[146] [Emphasis added].

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[143] Exhibit 59, Brief of Documents Prepared for James Nicholson, Tab 24, Email from James Maunder to Minister Moore et al. re: Mobilicity Update dated April 18, 2014.
[144] Cross-Examination of James Nicholson, December 21, 2023, Transcript, at p. 3621.
[145] Exhibit 59, Brief of Documents Prepared for James Nicholson, Tab 27, Email outlining response to Telus' proposal and possibility of introducing new rules to bar incumbents from acquiring further spectrum.
[146] Cross-Examination of James Nicholson, December 21, 2023, Transcript, at pp. 3619-3632; Exhibit 59, Brief of Documents Prepared for James Nicholson, Tab 27, Email outlining response to Telus' proposal and possibility of introducing new rules to bar incumbents from acquiring further spectrum.

359. Nicholson confirmed that in orchestrating this campaign, he kept the Department of Industry (the officials who regulate spectrum transfers and related issues) out of it. This further reinforces how removed the actions were from ordinary course regulatory policy implementation.

360. As a result, and as Nicholson expected, the senior Government officials were themselves surprised to see the article in the Globe & Mail.[147]

361. The evidence Nicholson gave at trial regarding the statement he wrote in the email discussing "taking down one company (TELUS) in particular" was no less troubling than is the written statement itself.[148]

362. Confronted with his straightforward statement about directly targeting TELUS, he initially suggested that was not what he was saying. He then suggested that what he was saying was that he did "not necessarily want to do that", and that he did not want the implication to be that it was "squarely targeted at Telus": [149]

> Q. And so, as you are saying, you are directly targeting Telus, correct?
>
> A. That's not what I'm saying.
>
> Q. So when I read the words that "this is targeted squarely at Telus," you weren't targeting Telus?
>
> A. Let me just re-read this, please. What I'm saying is that --
>
> Q. That you want to be --
>
> A. (Reading): "... providing direct quotes more carefully between matter-of-fact statements between spectrum availability for new entrants and directly implicating ..." [as read.] So what I'm saying is I don't necessarily want to do that.
>
> Q. Okay. You don't want to necessarily directly be seen to be targeting Telus, you want to target Telus but also create the implication that any other company that defies the Minister in its efforts to acquire spectrum or Mobilicity will also be targeted, right? Is that fair?
>
> A. No, I don't think we would want to target a company. What I think we wanted to do was make it clear that there were implications about -- if it's in a broader policy context.

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[147] Cross-Examination of James Nicholson, December 21, 2023, Transcript, at pp 3625-3626.
[148] Cross-Examination of James Nicholson, December 21, 2023, Transcript, at pp. 3627-3629.
[149] Cross-Examination of James Nicholson, December 21, 2023, Transcript, at pp. 3627-3629.

Q. The implication being that you'll get taken down?

A. No, the implication is that spectrum availability may have to be reconsidered based on the allocation or what's available for new entrants.

Q. So when you use the word "target" and "take down" one company, Telus in particular, you didn't mean take down?

A. What I'm saying here is I didn't want the implication to be that it was squarely targeted at Telus.

Q. Right, you wanted the implication to be that it was squarely targeted at Telus and Bell and Rogers and any company that didn't do what the Minister wanted them to do, right?

A. No, given that we may want to later pivot this to a broader policy decision had to be about new entrants and more competition --

Q. You wanted --

A. -- rather than taking down one company.

Q. You wanted the incumbents to know that if they didn't go along with the broader policy decision of yours, when you pivoted to it, they would get targeted, they would get taken down; that's the natural meaning of your words, right?

A. Rather than taking down one company. I'm not saying -- I'm taking down -- we are taking down any company here. I'm saying -- what -- the lines as they were written -- we're talking about edits to media lines here and so what I was taking issue with was that we wanted to be more careful with our language and not, you know, and not come off like this is what we were doing.

Q. Which is exactly what you were doing, sir; right?

A. I was not targeting -- I was not taking down any specific -- trying to take down any company, specifically.

Q. Well, excluding Telus from the 2500 MHz auction which they desperately needed because the network would crumble without it, wasn't taking it down?

A. So, that was -- that was what was purported to me by Mr. Woodhead. I would make reference to the fact that it was quite common for telecommunications carriers to very much put

everything in very stark and dramatic terms when it came to what was going to happen.

Q. These are your words, sir.

A. What -- sorry, which words?

Q. So you aren't prepared to agree with me that this option that you were designing, along with Mr. Velshi, was targeted at Telus; you are not prepared to accept that?

A. No -- targeted, what I'm trying to explain is that we were not trying to take down a company.

Q. Okay, so I should -- when I see your words "take down," I shouldn't read them as taking down a company?

A. I said "rather than taking down one company."[150]

363. Finally, Nicholson conceded the obvious: that TELUS, in its capacity as bidder for Mobilicity, was the target of the campaign.

Q. All right. But you were targeting them?

A. The purpose of this article is to -- yes, send a message of the broader implications to Telus --

Q. To target Telus; fair?

A. To Telus, yes.

Q. To target Telus; fair?

A. The article was -- sorry, the article was -- like, it's written here that we put this into context because there was clearly a situation where Telus was trying to acquire Mobilicity and we wanted them to understand what the implications of that were.

Q. And what you were doing was telling them that if they persisted they would be the target of the Minister's ire. They are in a regulated environment and it is not going to end well with them -- for them, right?

A. I don't see the word "ire" in here.

[150] Cross-Examination of James Nicholson, December 21, 2023, Transcript, at pp. 3627-3629.

> Q. I know, that's my word. But that's the message. Telus was the target; fair?
>
> A. Fair.[151]

364. Nicholson was equally evasive in his evidence about his conversation with the Senior Executive at TELUS (Mr. Ted Woodhead) regarding the 2500 MHz auction from which the Government was threatening to exclude TELUS, knowing how critical it was for that company.

365. As noted above, Nicholson understood and intended that this targeted campaign had direct implications for Mobilicity and the investors who capitalized Mobilicity [emphasis added].[152]

366. This was also the application of pressure to which TELUS was particularly vulnerable and sensitive. The article named TELUS, and specifically referenced its efforts to acquire spectrum set-aside for new entrants. The only set-aside spectrum it was attempting to acquire was that of Mobilicity. There was no other spectrum at play and TELUS needed the 2500 MHz spectrum that was the subject of the then upcoming but entirely unrelated auction.

367. Then the 2500 MHz auction was upon it. Success in that auction was vital to TELUS, as was well known to, and understood by, the Government. In her evidence, Gillis acknowledged that the 2500 MHz auction was critical to TELUS because, while its major competitors and the other two incumbents (Bell and Rogers) had extensive 2500 MHz spectrum already, TELUS had little.[153] Even the Globe & Mail article itself acknowledged this, and stated:

> the auction rules put caps on how much spectrum companies can own in each region and Bell and Rogers are currently at or near their cap in most areas, government sources say. This leaves Telus as the only major incumbent eligible to acquire significant portions of the 2,500 MHz spectrum in the auction.[154]

368. When asked about the Minister's alleged threat and whether there was a discussion at the time about taking steps to amend the 2500 MHz auction rules, Gillis was clear in her evidence that "we would have done potentially some preliminary analysis, but no steps were taken and the rules were not changed."[155]

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[151] Cross-Examination of James Nicholson, December 21, 2023, Transcript, at pp. 3629-3631.
[152] Cross-Examination of James Nicholson, December 21, 2023, Transcript, at pp. 3631-3632.
[153] Cross-Examination of Kelly Gillis, December 20, 2023, Transcript, at p. 3325.
[154] Exhibit 1, Joint Brief of Documents, Section 268, Ottawa Threatens to cut Telus out of wireless auction Globe & Mail article dated April 25, 2014.
[155] Examination-in-Chief of Kelly Gillis, December 19, 2023, Transcript, at p. 3224.

369. The evidence of Gilfillan was that she had no knowledge of anyone in the Minister's office reaching out to anyone in the department, and she herself would have been the go-to person. Her evidence was clear:

> I can tell you that I was responsible for running the 2500 auction and no one -- neither me nor anyone on my team was asked to carry out the analysis and we were the ones that would have run any -- we ran the original consultations, we would have run the subsequent consultations and recommendations to the Minister.[156]

370. Further, when asked whether any change to the rules or policies would have entailed a further consultation and consideration, she replied, "absolutely."[157] None of that had been done.

371. As with the 2008 AWS Spectrum Auction, pursuant to which Mobilicity acquired its licences, the rules governing the 2500 MHz spectrum had long been established. Amendments to those rules would have required analysis and consultation, none of which had occurred.

372. As acknowledged by Gilfillan (who was the senior Government bureaucrat responsible for the auction) and Gillis (who was the liaison within the Department of Industry with that Minister), the message to TELUS could not have been clearer: stop pursuing Mobilicity, or the Government will prevent you from acquiring your desperately needed 2500 MHz capacity.

373. The evidence of the Government witnesses with respect to these events was extraordinary and candid. Gilfillan testified that she was not aware of the article in advance of reading it in the newspaper (and notably, she was the senior Government official responsible for running the very auction discussed).[158]

374. Gillis testified that the article "surprised" her.[159] She was clear that she was unaware of how the article came to be and had not seen any emails or internal correspondence with the communications staff in the Minister's office when preparing the content that was provided to the Globe & Mail. Gillis expressly agreed with the evidence of Gilfillan that a party could not just be cut out of the 2500 MHz auction, and that there had to be a consultation process that was public. She agreed, however, that this is not what the article communicated.[160]

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[156] Exhibit 74, Plaintiffs Brief of Read-Ins from the Examination for Discovery of Peter Hill and Fiona Gilfillan, p. 198.
[157] Exhibit 74, Plaintiffs Brief of Read-Ins from the Examination for Discovery of Peter Hill and Fiona Gilfillan, pp. 198-199.
[158] Cross-Examination of Fiona Gilfillan, December 12, 2023, Transcript, at pp. 2163-2164.
[159] Cross-Examination of Kelly Gillis, December 20, 2023, Transcript, at p. 3322.
[160] Cross-Examination of Kelly Gillis, December 20, 2023, Transcript, at p. 3338.

375. The evidence of Gillis continued:

> Q. Right. Ms. Gilfillan explained that to us, that someone couldn't just be cut out, there had to be a consultation process and it had to go public, right?
>
> A. Correct.
>
> Q. That's the way the rules work, correct?
>
> A. Correct.
>
> Q. But what was being said was we'll just cut you out, right?
>
> A. Yeah, which is substantively not -- not what would happen, but, yes.
>
> Q. Okay. So the governments threatened to do something what you are saying it doesn't have the power to do, right?
>
> A. When we look at the government is doing this, as a -- the regulator and the officials, there's a regulatory process that we would follow.
>
> Q. And you thought that the threat therefore was offside your regulatory process, right?
>
> A. I thought it was -- that's, you know, political posturing, and we are going to follow a regulatory process for anything that happens.
>
> ...
>
> Q. I understand that, but did anyone -- you have told me no one wrote that. Did anyone say to the Minister's Office or Mr. Nicholson, you can't cut a licensee out of an auction?
>
> A. So in -- there's lots of communication between the Minister's Office and officials, and both Minister Nicholls [sic] and Mr. Maunder were well aware of the regulatory process at the time.
>
> Q. Okay. So what you are telling me is that both Minister -- excuse me, that both Mr. Nicholson, I think you said, and Mr. Maunder were aware of the regulatory process, which I take to mean that the government could not do what it was suggesting it would do in the Globe article, fair?

> A. What I'm saying is for -- if we were going to design an auction or any actually regulatory change there's due process that happens, and we would look at, as the regulator, the spectrum holdings, the intent of what the outcome we are trying to achieve and follow due process for that to happen.
>
> Q. And is this why you were surprised by the article because it violated the due process that governed the rules regarding participation in spectrum auctions?
>
> A. Yes. [emphasis added].[161]

376. In my view, this candid admission from a senior government official like Gillis is extraordinary. She agreed that the Government position, as expressed in the Globe & Mail article, violated the due process that governed the rules regarding participation in spectrum auctions.

377. I listened carefully to the evidence of Gillis. She was not prone to hyperbole or exaggeration. On the contrary, I found her to be careful, measured, and cautious in her responses, honest and forthright - in short, everything that Canadians expect a senior member of the federal public service to be. My assessment of her credibility in this regard makes the statement all the more compelling.

378. The evidence of Hill was to the same effect. He too was surprised by the article and had no prior knowledge of its contents. He also directly conceded that what was proposed by the Government would be inconsistent with good regulatory practice:

> Q. May I suggest to you that you were surprised by it because you considered it an abuse of the regulator's power to threaten a carrier like that, fair?
>
> A. It wouldn't be consistent with good regulatory practice.
>
> Q. It would be inconsistent with good regulatory practice, correct?
>
> A. Yes.[162]

379. Hill further agreed on cross-examination that the Minister is supposed to exercise discretion in accordance with his powers under the Act and cannot intentionally create delay or favour one entity against another:

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[161] Cross-Examination of Kelly Gillis, December 20, 2023, Transcript, at pp. 3338-3340.
[162] Cross-Examination of Peter Hill, December 14, 2023, Transcript, at pp. 2711-2712.

> Q. Of course, but you and I can agree, sir, you are an experienced regulator, that while the Minister has discretion, he is expected to exercise it in accordance with the rules, right?
>
> A. With -- in accordance with his powers under the Act.
>
> Q. In accordance with the purposes of the Act and in accordance with the policy instruments like the framework and the licensing framework, right?
>
> A. Agreed, and those change from time to time.
>
> Q. Sure. But the regulator, whether it's the department ultimately or the Minister, can't just do what they want to do, they have to have -- they have to exercise their power in a way that is rationally connected to the purposes of the statute, and the purposes of the licensing regime, fair?
>
> A. Fair enough, but the Minister also does have pretty broad powers under the Act and consideration of issues, so, you know, there's a balance.
>
> Q. Well, for instance, he can't intentionally create delay in the system to favour one entity and prejudice another; that's not fair and proper, right?
>
> A. In a general sense I would tend to agree with you.
>
> Q. Okay. He's supposed to be evenhanded and giving all licensees who are licensed by him an equal opportunity to avail themselves of the benefits and opportunities of the licence he grants, fair?
>
> A. I think so. I can't -- I mean it was a long point you were making, but, yeah, the general gist of it, I don't disagree with.[163]

380. One might have hoped that the article could be explained as a miscommunication, or a misinterpretation by Chase, the reporter, of the position of the Government. However, as noted above, it was precisely accurate, and that was because the Government supplied the quotes directly. And it had supplied them without the involvement or even the knowledge of the very Government officials who were responsible for the auctions and related policies.

381. To the frustration of the Government, and despite the article and the direct pressure from the Government, TELUS did not immediately withdraw its offer for Mobilicity.

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[163] Cross-Examination of Peter Hill, December 13, 2023, Transcript, at pp. 2519-2521.

382. In May 2014, the court-ordered mediation began. However, the Government was also undeterred and continued its campaign of interference in the sale of the Mobilicity licences.

383. Aziz testified that during that mediation process (at which he was present), and following the second day of court-ordered mediation sessions, the Minister of Industry contacted Darren Entwistle, CEO of TELUS ("Entwistle"), outside of the mediation process and asked him to withdraw TELUS' offer to purchase Mobilicity.[164] Aziz described this in his evidence as "an approach to Telus outside of the confidential mediation about the mediation".[165]

384. Aziz was taken in his evidence to Minutes of a meeting of the Board of Directors of Mobilicity dated May 22, 2014 (at which he was also present), and which expressly reflected that he reported to the Board this communication to Entwistle from the Minister. His evidence at trial was further consistent with the reports to the Board as reflected in the Minutes. Specifically as a result of the pressure, the Government had "completely undermined" the court ordered mediation, which still had one further day to run (however, the mediation did not continue as planned). The Minutes also correctly reflect, as confirmed by Aziz, that by prematurely 'throwing water' on the transaction, the Government had also precluded Mobilicity from being able to pursue a motion under s. 11.3 of the *CCAA:*

> Q. Sir, I just want to take you to the second paragraph of this section, just so we have a timeline right. So it says: "Mr. Aziz reported that the first two days of mediation were very positive and that the parties made good progress towards a mutually agreeable solution." Does that refresh your memory about how the first two days went?
>
> A. It was cordial, let's say that. There was no disagreement at that time. As I said, we were exchanging views. We didn't even know whether Industry Canada was going to show and who was going to show necessarily, but it was cordial, so it was the second day that it fell apart.
>
> Q. Okay. And you see in the next paragraph there's a reference to what happened following the second day of the mediation. And when you say it fell apart, why did it fall apart, the mediation?
>
> A. Well, it says here that I reported that the Minister of Industry warned Telus to pull out of the mediation, so they were being --

[164] Examination-in-Chief of William Aziz, December 1, 2023, Transcript, at pp. 550-551.
[165] Examination-in-Chief of William Aziz, December 1, 2023, Transcript, at p. 550.

there was an approach to Telus outside of the confidential mediation about the mediation.

Q. And what was the result of that approach to Telus?

A. Telus was still interested in buying the company. They ultimately decided, as it says, to continue to pursue our spectrum assets, so they weren't dissuaded by that.

Q. Did the mediation continue after that?

A. Just that day.

Q. Okay. So not after that day?

A. Not after that.

Q. All right. And, sir, if you look at the last paragraph on this page.

A. Yes.

Q. There's a reference to the government having completely undermined the mediation, which still had one further day to run?

A. Yes.

Q. Was that accurate?

A. Yes. They went around the process and tried to dissuade Telus from continuing to participate, so the Minister contacted I believe it was Darren Entwistle, the CEO of Telus, to ask him to withdraw from this and to back off.

...

Q: ... And then, sir, there's a reference in the last line here to the corporation, or this precluding the corporation from being able to pursue a motion under section 11.3 of the CCAA.

A. Yes.

Q. Do you know what that's a reference to, that motion?

A. Yes, we had discussions about whether or not Justice Newbould could order a transaction that would transfer the spectrum vest it with a purchaser, and over the objections of Industry Canada and their administrative policies.

> Q. And what impacts did these interactions or this pressure on Telus have for that potential motion?
>
> A. Well, as I said, it threw water on it, cooled it totally.
>
> Q. Was that motion ultimately brought?
>
> A. No.[166]

385. Finally, in this regard, Aziz confirmed that as a result, two things occurred, or more precisely, did not occur. First, the third day of the mediation never proceeded. Second, the proposed s. 11.3 motion was never brought. TELUS had succumbed to the pressure and withdrawn its offer. The evidence of Aziz went unchallenged on cross-examination.[167]

386. On May 20, 2014, unable to take the risk of being disqualified from the critical 2500 MHz spectrum auction, TELUS finally heeded the Minister's warning and withdrew its offer of $380 million for the Mobilicity spectrum licences.

387. The Government had finally succeeded in its objective of interfering in the sale of the Mobilicity licences. TELUS, which had first offered to buy the licences in May 2013 for $380 million, succumbed to the threat of being improperly excluded from the 2500 MHz auction, and abandoned (for the time being) its efforts to acquire the Mobilicity licences.

388. All the while, Mobilicity remained deadlocked in the *CCAA* process. TELUS remained out as a potential bidder of the Mobilicity spectrum as a direct result of the pressure from the Government and the Minister's office, including the threat to change the rules for the 2500 MHz auction (as previously discussed, without any of the required consultation having been undertaken) to exclude TELUS from that spectrum it desperately needed.[168] The Mobilicity insolvency proceedings continued.

The 2015 Government Interference in the Sale of the Mobilicity Licences

389. By early 2015, some months after the forced retreat of TELUS from Mobilicity, three further spectrum auctions had occurred: 700 MHz, AWS-3, and 2500 MHz. The wireless telephone telecommunications business in Canada, facilitated by available spectrum, was changing and evolving extremely rapidly.

390. Hill testified that the "world had changed" and that these auctions "dramatically changed" Canada's spectrum landscape.[169] Specifically, 60% more spectrum capacity

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[166] Examination-in-Chief of William Aziz, December 1, 2023, pp. 549-552.
[167] Examination-in-Chief of William Aziz, December 1, 2023 Transcript, at p. 551.
[168] Examination-in-Chief of William Aziz, December 1, 2023, Transcript, at pp. 550-551.
[169] Examination-In-Chief of Peter Hill, December 13, 2023, Transcript, at pp. 2426-2427.

was added to the market, which in turn increased new entrant spectrum ownership by 300%.

391. At this point, new entrants held 25% of the spectrum, a significant increase over the proportion previously held.[170] The changes in the Canadian spectrum landscape alleviated Industry Canada's concerns about spectrum concentration to a very significant extent.

392. Hill advised Aziz that Industry Canada was now "satisfied" with the amount of spectrum in the hands of new entrants and that its concerns about undue concentration had been "alleviated because there was plenty of other spectrum out there."[171]

393. An Industry Canada Briefing Note entitled "Spectrum Context" dated May 5, 2015 and prepared by Hill for the Assistant Deputy Minister and others in the Minister's Office stated that "all parties who needed spectrum to grow/expand had ample opportunity to obtain spectrum at low prices ... . There is no spectrum concern ... , industry and financial analysts are all fully aware that spectrum concentration is no longer an issue.[172]

394. As a result, the policy of Industry Canada changed, and it was no longer as acutely concerned with transferability of spectrum licences to incumbents as opposed to new entrants.[173]

395. The Briefing Note further explained that this meant that the previously proposed option to transfer between Rogers and Shaw "can be approved" and further that "any decision rendered for Rogers/Shaw would dictate the same response to future Wind and Mobilicity transactions".[174]

396. This meant two things.

397. First, there was, by the Government's own admission, no longer any policy rationale to oppose or interfere with the sale of Mobilicity (i.e., transfer of its spectrum licences) to an Incumbent or anyone else. The much-discussed "five-year moratorium" licence condition was now irrelevant. The five-year period had expired, and the policy rationale underlying it was now gone.

398. Second, the path was now clear for an open and hopefully robust bidding war for Mobilicity and its spectrum licences. For the first time, the market was unrestricted. Eligibility and Canadian ownership requirements continued, but the Incumbent/new entrant dichotomy had been removed.

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[170] Exhibit 57, Briefing Note for the Minister's Office "Spectrum Context", at pp. 1-2.
[171] Examination-in-Chief of William Aziz, December 1, 2023, Transcript, at pp. 560-561.
[172] Exhibit 57, Briefing Note for the Minister's Office "Spectrum Context", at pp. 1-2.
[173] Exhibit 57, Briefing Note for the Minister's Office "Spectrum Context", at pp. 1-2.
[174] Exhibit 57, Briefing Note for the Minister's Office "Spectrum Context", at pp. 1-2.

399. Predictably and expectedly, a renewed bidding war for Mobilicity ensued. Throughout June 2015, TELUS and Rogers presented rapidly and successively escalating bids. For the first time, and as a result of this change in the regulatory environment, multiple offers to purchase Mobilicity materialized.

400. In May 2015, TELUS, who had been desirous of purchasing Mobilicity for approximately two years, confirmed its interest with a new offer to purchase Mobilicity, albeit for $350 million, less than its 2013 offer of $380 million.

401. Approximately two weeks later, on June 1, 2015, Rogers submitted what Aziz considered to be a "lowball" offer "out of the blue" to acquire Mobilicity for $250 million.

402. Notably, Rogers' offer was connected to the ongoing Rogers/Shaw merger, which was set to close on June 25, 2015. It therefore contained a deadline imposed so that it could avoid a break fee of $50 million. However, the unchallenged evidence of Aziz was that he did not consider this deadline to be real, and fully expected that Rogers would have agreed to extend it. Aziz testified that, notwithstanding the lower amount of the offer, the interest of Rogers in purchasing Mobilicity was "a game changer" because there was now, for the first time, a friendly regulatory environment and the active participation of TELUS and Rogers, both of which were "very well-funded" and were "aggressive and competitive" bidders.[175]

403. As Aziz put it, this market structure represented "an ideal situation for an auction to start."[176] This allowed him to foster "a blind auction where each bidder didn't really know what the other bidder was bidding, but knew that the other bidder was aggressively and eagerly pursuing a possible acquisition."[177]

404. That is precisely what occurred, and in short order. These two bidders submitted between them eight offers for Mobilicity in the extremely short period of approximately three weeks between June 1 and June 23, 2015. The bidding can be only described as intense:

Date	Purchaser	Offer
JUNE 1, 2015	ROGERS	$250 MILLION
JUNE 10, 2015	ROGERS	$350 MILLION
JUNE 14, 2015	TELUS	$375 MILLION
JUNE 18, 2015	TELUS	$430 MILLION

[175] Examination-in-Chief of William Aziz, December 1, 2023, Transcript, at p. 566.
[176] Examination-in-Chief of William Aziz, December 1, 2023, Transcript, at p. 566.
[177] Examination-in-Chief of William Aziz, December 1, 2023, Transcript, at p. 585.

JUNE 19, 2015	ROGERS	$450 MILLION
JUNE 19, 2015	TELUS	$472 MILLION
JUNE 22, 2015	TELUS	$547 MILLION
JUNE 23, 2015	ROGERS	$465 MILLION

405. As can be seen, it began with an initial offer from Rogers for $250 million, followed by Rogers bidding against itself only nine days later at $350 million (confirming the accuracy of Aziz' description of the initial offer as a "lowball"). TELUS then submitted two consecutive offers, the parties went back and forth, with the final TELUS bid at $547 million on June 22 and the final Rogers bid at $465 million on June 23, 2015. The bidding concluded with the Rogers offer of June 23, 2015, at $465 million.

406. Expressed differently, in that short three-week period, the value of Mobilicity, as represented by these bids, had increased by no less than 86% using the final Rogers bid, and by over 100% using the final TELUS bid.

407. The evidence of Aziz was that, by June 22 (the date of the final TELUS bid), he (as CRO) expected to receive additional bids and expected the next round of bids to have a floor in the $500 million range. The sales process had developed significant momentum and the value accruing to the stakeholders of Mobilicity was rising significantly. He was not challenged on this evidence in cross-examination.[178]

408. I found the evidence of Aziz persuasive and compelling. He was involved directly in the bidding war. While called as a witness by the Plaintiffs, he was not a representative of either Obelysk or Quadrangle. Rather, he was involved in his capacity as CRO, charged with trying to maximize recovery in the insolvency proceeding for stakeholders of Mobilicity. He was not a shareholder or creditor of Mobilicity (other than perhaps with respect to his court-approved professional fees). In short, he was not a representative of any party with a pecuniary interest in recovery. Moreover, he had significant experience in conducting sales processes for distressed businesses, including pursuant to auction.

409. Time was of the essence, as is clear from the rapid succession of bids described above. It follows that so too was the timeliness of reviews by Industry Canada in respect of transfer requests on which any bid obviously depended.

410. The evidence was that Mobilicity and any potential purchaser required preliminary approval in respect of any transaction prior to entering into a final agreement, without which the closing risk was insurmountable.[179]

[178] Examination-in-Chief of William Aziz, December 1, 2023, Transcript, at pp. 603-604.
[179] Examination-in-Chief of William Aziz, December 1, 2023, Transcript, pp. 564-565.

411. This was not news to any stakeholder. In fact, approximately a year earlier in January and February 2014, Hill had written to Aziz acknowledging the fact that things were transpiring rapidly and confirming that Industry Canada recognized the importance of immediate responses from Industry Canada to licence transfer requests.

412. Hill promised to be as helpful as he could be throughout the sales process. Most notably, surrounding the preliminary approval process. Hill testified that "[w]e would drop many things and people worked long, long days" to turn the approvals around quickly.[180]

413. Gillis additionally confirmed the importance of expediency to the efficacy of the sales process as to both 2014 and 2015, stating:

> Q. Right. And we can agree, as we discussed earlier, that the department had made a commitment twice in writing to Mr. Aziz to make itself available to act as expeditiously as possible, and to be as responsive as possible to assist in the CCAA sales process, right?
>
> A. Correct.
>
> Q. And that commitment remained in 2015 and your department stood by it, right?
>
> A. We did.
>
> Q. Because it was very important to the efficacy of the sales process Mr. Aziz was conducting for the benefit of all Mobilicity stakeholders, right?
>
> A. Correct.[181]

414. Consistent with Hill's promises and representations, Industry Canada was able to provide, and did in fact provide, preliminary approval of the proposed Rogers transaction within two days, notwithstanding its complexity.[182]

415. This was not the exception. On the contrary, this was completely consistent with the practice and actions of Industry Canada. In his extensive discussions with Aziz, Hill never raised the possibility that Industry Canada would be unwilling or unable to provide a preliminary assessment in a timely manner, as was done in that instance. The Plaintiffs submit, and I accept, that there are no contemporaneous documents in the record that indicate any difficulties or challenges with continuing to process transfer

[180] Cross-Examination of Peter Hill, December 15, 2023, Transcript, at pp. 2894-2895.
[181] Cross-Examination of Kelly Gillis, December 20, 2023, Transcript at pp. 3362-3363.
[182] Cross-Examination of Peter Hill, December 15, 2023, Transcript, at pp. 2891-2893.

requests within a day or two. Again, and as noted above, not only was that not accurate, but Hill proactively confirmed to the parties his commitment (as the senior bureaucrat in charge of spectrum licences) to process requests immediately, cognizant of the time sensitivity.

416. However, as the bidding war for Mobilicity heated up in 2015, Industry Canada did two additional things contrary to its duties as a regulator.

417. First, it opposed a new, arbitrary, and targeted condition on the transfer of the Mobilicity licences. It did so because of the Government's desire to assist another new entrant, Wind, and force the transfer to Wind (for no consideration) certain licences to assist that carrier in a specific region (Eastern Ontario).

418. Industry Canada was clear with TELUS and Rogers in the spring of 2015 that it expected any transaction between either of them and Mobilicity to include a provision for the transfer of Mobilicity spectrum licences for Eastern Ontario and Outaouais (essentially the Gatineau and Papineau region of Quebec) to Wind.

419. This was improper in two respects. First, this was a restriction on the transfer of Mobilicity's licences only (not the spectrum licences of any or all other licencees) and the condition directed and required to transfer to a specific recipient – Wind.

420. Second, there was no basis for this condition in the *2013 Transfer Framework*. Nor was there any general policy rationale. This was not in any way the implementation of policy with respect to spectrum allocation in Canada (and as noted above, the Government had confirmed that its long-standing concerns with respect to spectrum allocation no longer applied by this time).

421. Rather, this represented direct and inappropriate micromanagement to favour one specific entity, Wind. Seen that way, it was quite extraordinary: the Government was specifically directing one licencee to gift spectrum in a very specific region exclusively to another licencee. The Defendant adduced no evidence at trial with respect to any regulatory basis or even a policy rationale for such a condition. Yet it was nonetheless imposed.

422. The second action Industry Canada took that was contrary to its duty as a regulator was to artificially delay the release of a decision on a transfer request, again in respect of Mobilicity's licences only.

423. Aziz advised Bitove and Huber that "[f]undamental to either a TELUS or Rogers transaction" was the new arbitrary requirement imposed by Industry Canada: Wind needed to "be *given* some of the spectrum that either [i.e. TELUS or Rogers] acquires"

[Emphasis added].[183] Hill later conceded that the introduction of this novel requirement to the licence transferability process was unnecessary for approval.[184]

424. For the first time, a criterion other than Canadian eligibility was introduced into the spectrum licence transfer approval process. Moreover, it was not simply introduced as a factor to be considered, but rather was a mandatory requirement, and one that amounted to a compelled and specific redistribution of spectrum capacity to a particular and identified recipient. No licence transfer would be approved unless one of the other new entrants, and not any other new entrant, but specifically Wind, was expressly and specifically allocated spectrum.

425. Industry Canada did not disclose then, nor did it justify at trial, any basis for this additional obligation. On cross-examination, Hill confirmed that nothing in the *2013 Transfer Framework* extended the regulator's role to dictating specifically which industry player should receive spectrum as a condition of the transfer of a licence:

> Q. Thanks. Ms. Gilfillan testified on discovery[185], and you told us the same thing in your testimony in-chief, that what the department would not do is say who a licence should be transferred to, fair?
>
> A. Fair.
>
> Q. Okay. If the department has a concern about concentration in a particular area, it will just refuse the transfer of that licence, right?
>
> A. Yes. An applicant comes to us, say I want to transfer to company B. We say possibly no to transfer to company B for spectrum concentration concerns --
>
> Q. Right --
>
> A. -- broadly stated. We don't say it might be okay if it would go somewhere else.
>
> Q. Right, that was my point. You wouldn't then turn around and say we don't like company B, but if you gave it to company A we would be okay with it?
>
> A. Yeah, no, that would not be proper.

[183] Exhibit 1, Joint Brief of Documents, Section 313: Email from Bill Aziz to John Bitove et al. re: CONFIDENTIAL- Information for Tonight's Call dated June 14, 2015.
[184] Cross-Examination of Peter Hill, December 15, 2023, Transcript, at p. 2929-2930.
[185] Exhibit 74, Plaintiff's Brief of Read-Ins from Discovery Exam of F. Gilfillan and P. Hill, at p. 247.

> Q. And that's because the transfer framework is not about favouring one company over another, right?
>
> A. Absolutely.
>
> Q. And there's nothing in the transfer framework that would dictate that a licence should be transferred to any specific company?
>
> A. Nothing whatsoever.[186]
>
> [emphasis added].

426. There was no regulatory policy basis for requiring the imposition of a benefit specifically on Wind. Aziz explained the requirement to Mobilicity's Board of Directors. This way, the "facilitation of Wind as a competitor and its migration to LTE are looked upon favourably by the government, including the Prime Minister and PMO."[187]

427. Further, and importantly, Hill as the senior bureaucrat with responsibility for spectrum licence transfers, conceded that but for the political interference, he would have approved the proposed licence transfer without any requirement that spectrum be transferred to Wind:

> Q. Okay. And then second, was it you who provided the department's confirmation about what the letter did and didn't cover?
>
> A. I don't -- I certainly didn't, nor would I have.
>
> Q. Okay. So that --
>
> A. I had already approved the application. As I said a number of times. I, don't tell people what to put in applications.
>
> Q. I understand.
>
> A. That application could have come to me without the name Wind in it and it probably would have been approved.
>
> Q. Without the name -- sorry, I didn't quite follow that.
>
> A. Had the transaction come to me with no reference to Wind, it's highly likely I agreed. I know I'm talking -- I keep saying I'll

[186] Cross-Examination of Peter Hill, December 15, 2023, Transcript, at p. 2853-2854.
[187] Exhibit 1, Joint Brief of Documents, Section 313: Email from Bill Aziz to John Bitove et al. re: CONFIDENTIAL- Information for Tonight's Call dated June 14, 2015.

> have to see the application at the time in front of me, but given the context of the analysis we did at the time, I -- personally my recommendation would have been to approve the transfer without Wind.
>
> Q. I see. You mean even if the Eastern Ontario licence was just going to Telus with all the others?
>
> A. Yes.[188]
>
> [Emphasis added].

428. However, in response to the new condition imposed by the Government, both Rogers and TELUS agreed to include in their respective bids for the Mobilicity licences a covenant to transfer certain Eastern Ontario licences to Wind.

429. On June 9, 2015, Rogers submitted a request for a confidential preliminary assessment of a proposed transfer of Mobilicity's spectrum licences in its favour. On June 11, 2015, (two days later, consistent with its practice) Industry Canada granted preliminary approval such that that the proposed transaction would result in the transfer of Mobilicity's AWS 1 Spectrum licences to Rogers.[189]

430. On June 12, 2015, Aziz requested from Industry Canada a preliminary assessment of a potential deemed transfer of Mobilicity's spectrum licences as part of any proposed transaction. Notwithstanding the absence of any basis for the arbitrary condition to give certain spectrum licences to Wind, Wind was included specifically as directed by Industry Canada (i.e., as recipient of the Mobilicity Eastern Ontario licences) regardless of who the purchaser of the balance of the licences was.

431. On June 18, 2015, only six days later, Industry Canada responded to advise "that the result of the proposed transfers would not impair the ability of existing and future competitors to provide services in the affected licence areas." As a result, the transfers would be approved.[190]

432. The expectations of all stakeholders were that, consistent with the unwavering past practice and the representations in particular from Hill, Industry Canada would issue decisions on proposed licence transfers in short order. Indeed, that is exactly what occurred here when the transfer requests of both Rogers and TELUS in respect of the Mobilicity licenses were approved within a few days.

433. On June 16, 2015, TELUS outlined a revised proposal to Industry Canada to account for the possibility that Wind may not agree to accept Mobilicity's Eastern

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[188] Cross-Examination of Peter Hill, December 15, 2023, Transcript, at pp. 2929-2930.
[189] Exhibit 48, Cross Examination Brief of Peter Hill, Tab 40, Email from Peter Hill attaching letter from Peter Hill (Industry Canada) to David Watt (Rogers) re: June 9, 2015 request for preliminary assessment.
[190] Exhibit 48, Cross Examination Brief of Peter Hill, Tab 41, Letter from Peter Hill to Telus and Mobilicity dated June 18, 2015.

Ontario spectrum. The proposal considered the possibility that if Wind declined the spectrum transfer for Eastern Ontario, any proposed licence transfer would apparently be automatically refused.[191]

434. Accordingly, and still very eager to acquire Mobilicity's spectrum licences, TELUS proposed an alternative: it would be prepared to simply surrender the Eastern Ontario spectrum licences to Industry Canada for redistribution a reallocation to whomever Industry Canada chose. In other words, the revised proposal submitted by TELUS contemplated the same acquisition of the Mobilicity licences, but included as a condition thereof the requirement that it divest its Eastern Ontario spectrum licences "to any other new entrant."[192]

435. The irony of the new requirement imposed by Industry Canada was that it had not socialized any of that with the intended recipient, Wind. What if that party did not wish to receive those licences? And that is exactly what happened.

436. Three days later, on June 19, 2015, Wind advised TELUS that it would not accept Mobilicity's Eastern Ontario spectrum licences due to a contractual exclusivity covenant with Rogers.

437. TELUS then wrote to Industry Canada (Hill) to seek an urgent preliminary assessment of the third aspect of the TELUS proposal, that if "for some inexplicable reason" Wind refused to accept a transfer of Mobilicity's Eastern Ontario spectrum, then TELUS would commit to returning the spectrum to the Department for reallocation or offering it to another entity as might be requested by the Department.[193]

438. However, the problem for Industry Canada was that it still did not want to approve a transfer of the Mobilicity licences to TELUS. Yet, it had no basis whatsoever to deny the transfer request.

439. In highly unusual fashion, and unlike what had happened with any previous transfer request, it was not addressed within Industry Canada at all, let alone in accordance with any transfer policy framework.

440. Instead, upon receipt of the letter, Hill sent it immediately (i.e., literally within a few minutes) directly to Gillis, the Associate Deputy Minister. The direct and immediate involvement of very senior political staff was unprecedented.

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[191] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests, and Decisions, Vol. 2, Tab 35, Correspondence Regarding Fifth Telus Proposal: TELUS write to Industry Canada and provides responses to request, dated June 16, 2015.

[192] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests, and Decisions, Vol. 2, Tab 35, Correspondence Regarding Fifth Telus Proposal: TELUS writes to Industry Canada and provides responses to request dated June 16, 2015.

[193] Exhibit 2, Joint Book of Admitted Regulatory Policies, Requests, and Decisions, Vol. 2, Tab 37, Letter to Peter Hill from Stephen Lewis, Re: Proposed transaction to acquire the issued and outstanding common shares of Data & Audio-Visual Enterprises Holdings Inc. ("Mobilicity") dated June 19, 2015.

441. TELUS proposed to satisfy the new condition by offering to simply return the Eastern Ontario licences to the regulator, who would then be free to allocate them to whichever party it wished.

442. While this had never been done before and was not contemplated in the *2013 Transfer Framework* (or any earlier document), it was proposed as a creative solution to the new and unprecedented requirement of the Government that any Mobilicity licence transfer requirement needed to reallocate Eastern Ontario spectrum to Wind, who ironically didn't want it.

443. Industry Canada's previous representations and actions lead both Mobilicity and TELUS to believe that the preliminary licence transfer approval request would be returned and approved within a reasonable time consistent both with past practice and Hill's representations (i.e., within a few days of submission). Nothing in this proposed transfer was inconsistent with the *2013 Transfer Framework* or the spectrum concentration concerns on which it was based.

444. Moreover, Hill testified that Industry Canada could in fact accept the return of spectrum, and as a result, no in-depth analysis would be required before approving or declining such a request. If accepted, the return would be instantaneous. This would have allowed the bidding war between Rogers and TELUS to continue.[194]

445. As if the urgency of the situation was not self-evident, TELUS specifically confirmed to Industry Canada the criticality of an urgent response, writing to the Minister of Industry that:

> ... The playing field for Mobi is not level until we receive a revised preliminary approval. The approval needs to be clear that TELUS will be permitted to close a transaction and temporarily take ownership of all spectrum licences on the clear proviso that we irrevocably commit to offer E. ON/Ottawa to Wind or return to IC within a reasonable period of time. Without this clarity, Wind can hold up a Telus transaction and therefore Mobi stakeholders cannot benefit from what we believe is a superior monetary offer from TELUS and they cannot look at our bid as having the same "certainty" of closing as a competing bid. We understand such a letter is in process but we truly need it this afternoon or we cannot meet the Mobilicity timelines and will be closed from the process. All of the necessary information is with the Department and we urgently require a definitive and unambiguous response.[195]

[194] Cross-Examination of Peter Hill, December 15, 2023, Transcript, at p. 2945.
[195] Exhibit 62, Cross Examination Brief Prepared for James Nicholson, Tab 15, James Nicholson of IC Summarizes Strategies with respect to Rogers- WIND and Telus- Mobilicity Transactions dated June 20, 2015.

446. Instead, and at the specific request and with the direct involvement of the Minister's political staff, Industry Canada unnecessarily, but intentionally, inappropriately, and for tactical purposes, withheld the release of any response on the proposed licence transfer.

447. The effect, precisely as intended, was to thwart the ability of TELUS to successfully bid for the Mobilicity licences and to manipulate the auction accordingly. By effectively removing TELUS as one of the two bidders, and thereby leaving Rogers effectively unchallenged, the Government prematurely terminated what was otherwise a competitive bidding process, and in doing so, ultimately reduced the value of the licences.

448. And it did so surreptitiously. It did not, for example, simply deny the licence transfer request. Instead, it elected to just not respond with a decision at all.

449. At the centre of this scheme was a letter dated June 22, 2015, from Hill to Aziz and the court-appointed Monitor. Hill wrote the letter in response to the June 19 letter from TELUS seeking an urgent preliminary assessment for the return of the Eastern Ontario/Outaouais licence to the Department should Wind refuse to accept the transfer.

450. The letter, unlike any previous response to a licence transfer request, confirmed that applications for the spectrum licence transfers would "continue to be reviewed "with the necessary level of considered analysis" even in "situations where negotiations may be time sensitive." Industry Canada advised that "this process may take 12 weeks or longer from the date of your request and all required information was received."[196] [Emphasis added].

451. How did that come about? In the context of an unwavering and consistent practice to turn around transfer approval requests within days, and a history of doing just that, Industry Canada was now advising that it would need three months or more. That statement was not true.

452. Further, on cross-examination, Hill conceded that the preliminary assessment analysis would not have taken 12 weeks, and, in fact, could have taken "a couple of days":

> Q. Okay. I take it, sir, be that as it may, none of that affected your responsibilities as a regulator to respond to the request for preliminary assessment, fair?

[196] Exhibit 1, Joint Brief of Documents, Section 333, Email to Minister Moore Attaching Letter to Bill Aziz, the Monitor, and Telus Notifying that Review May Take Twelve Weeks or Longer/Letter from Peter Hill (Industry Canada) to Bill Aziz (BlueTree Advisors Inc.), Biran M. Denega (Ernst & Young Inc.), and Stephen Lewis (Telus) re: process and timeframes under the Radiocommunication Act and Spectrum Licence Transfer Policy dated June 22, 2015.

> A. And I did respond, and I may have been able to even answer those questions explicitly in a letter that might have taken a couple of days, but they wanted an answer then.
>
> Q. Okay. And you don't anywhere in this letter suggest that you could provide an answer within a couple of days, do you, sir?
>
> A. I do not.[197]

453. It follows that the statement in the letter was untrue. In its Closing Submissions, the Defendant submitted at trial that in sending the letter, "Industry Canada reasonably informed TELUS that it needed more time to consider the implications"[198]. That is simply not what occurred.

454. As discussed above, Hill confirmed that Mobilicity's licences could have been returned to the Department instantaneously.[199]

455. An email dated Saturday, June 20, 2015, between Nicholson and Hill reveals Industry Canada's rationale and intention in sending the letter advising that Industry Canada would need up to 12 weeks to consider the request. In the email, Nicholson explains that the Government had two choices in response to TELUS' urgent preliminary assessment request:

> 1. Say nothing, and delay – we do this on the premise that we do not turn things around in 24h, etc., etc.
>
> 2. Definitively tell Telus that no deal without Wind will be approved.[200]

456. The fact that either of these two options were even under consideration is troubling.

457. The first option for a proposed response was simply untrue. Industry Canada did in fact, "turn things around in 24 hours", or at least "a couple of days" and had done so repeatedly, and Hill had expressly confirmed that it could and would do so again if the delay would inject unnecessary and artificial uncertainty into the transfer process.

458. The second option was at least more truthful, if not based in any policy rationale or reflected in the *2013 Transfer Framework*, but it represented a commitment to a path forward, and certainty: no transaction that did not include the transfer of the Eastern Ontario licences to Wind would be approved. At least the parties would know where they stood.

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[197] Cross-Examination of Peter Hill, December 15, 2023, Transcript, at p. 2948.
[198] Defendant's Closing Submissions, at para. 20.
[199] Cross- Examination of Peter Hill, December 15, 2023, Transcript, at p. 2945.
[200] Exhibit 62, Cross-Examination Brief Prepared for James Nicholson, Tab 15, James Nicholson of IC Summarizes Strategies with respect to Rogers- WIND and Telus- Mobilicity Transactions dated June 20, 2015.

459. The June 20 email explains the motivation of the Government in making a decision with respect to how to proceed which cannot be justified on any policy basis.

460. Nicholson highlighted that if the Government went with the second option, they feared that TELUS and Mobilicity would "unload" on them in the media. However, the Rogers/Shaw/Wind deal would be completed on June 25. If they went with the first option, they would drag out the Rogers/Shaw/Wind deal and leave Mobilicity on the table. Ultimately, Nicholson stated that "[t]his boils down to how far [they were] willing to shut down Telus", and he continued: "Telus would come to the conclusion that Industry Canada was favouring Rogers".[201]

461. For those reasons, Nicholson states that "we really have two choices." Importantly, neither of these options were predicated on any regulatory policy or principle. At risk of stating the obvious, I note that the two options were identified by Nicholson, part of the Minister's staff, and not Hill or anyone in his group of Industry Canada officials charged with responsibility for transferring spectrum licences.

462. As noted above, the first option was just untrue. The conundrum for the Government was that the second option was not to its liking. Nicholson understood that simply declining to approve the transfer to TELUS could very well allow TELUS, Mobilicity or the Plaintiffs to seek relief from the *CCAA* court, just as they intended to do in 2014, where, as discussed above, they brought a motion for an order compelling the assignment of the licences pursuant to section 11.3 of the *CCAA* and TELUS sought declaratory relief in its separate judicial review proceeding.

463. Nicholson explained this rationale on cross-examination:

> A. It never seemed to [be] end, to be completely honest.
>
> Q. Fair enough. If you had told them "no," a flat out "no," it might not end because they might review that in the courts, right?
>
> A. Presumably, yes.[202]

464. The very next day, on Sunday, June 21, Nicholson emailed the Minister himself (as well as other very senior staff) to reiterate his concerns. Those concerns had nothing whatsoever to do with any policy rationale, or even with respect to the objective of ensuring that Wind acquired spectrum licences for Eastern Ontario.

465. Moreover, Nicholson acknowledged in his email to the Minister that "TELUS would have to give up their acquired spectrum licences in Eastern Ontario to Industry Canada for zero compensation (we have no existing spending/legal authority to

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[201] Exhibit 62, Cross-Examination Brief Prepared for James Nicholson, Tab 15, James Nicholson of IC Summarizes Strategies with respect to Rogers- WIND and Telus- Mobilicity Transactions dated June 20, 2015.
[202] Cross-Examination of James Nicholson, December 21, 2023, Transcript, at p. 3653.

purchase spectrum)". He continued, "the problem with that scenario is that unlike what the Rogers deal would accomplish, we can't just turn around and 'give' the licences to Wind – much like with any spectrum held by the Crown, there needs to be a process, etc. to get it out into the market, which will take longer to do than we have left in our mandate."[203]

466. Nicholson noted:

> [o]ur position of requiring Wind to be in the transaction is the only consistent piece we've told all participants in the current Mobilicity scramble; if we send a letter to Telus indicating that is not necessary, there will be nothing stopping Rogers from jettisoning Wind as well should they so choose which could either result in a) them dropping out and Mobilicity going to Telus sans Wind, or b) go further all-in on a bidding war against Telus to acquire Mobilicity in its entirety.[204]

467. So, what did the Government do? It elected the first option.

468. The very next day, again, on Monday, June 22, Hill sent his letter implementing Nicholson's option one, "say nothing, and delay" on the expressed false premise that "we do not turn things around in 24 hours" (notwithstanding the fact that the department had done so repeatedly and consistently, and further, notwithstanding Hill's evidence that it could have done so, specifically in this case) and advising that Industry Canada might not respond for 12 weeks or more.[205]

469. The course of conduct had precisely the desired result. It terminated, effective immediately, the ongoing bidding war for the Mobilicity licences, which, as noted above, Aziz was confident was robust, accelerating, and would exceed significantly $500 million in offer value.

470. The auction was over. Aziz described the conduct as an effort by Industry Canada to "stiff-arm" the court-supervised sales process.

471. Hill's June 22, 2015 letter moved around quickly, and unusually for what was purportedly ordinary course for an urgent transfer approval request submitted to Industry Canada. Within one minute (literally) of delivering the letter, Hill forwarded it

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[203] Exhibit 62, Cross Examination Brief Prepared for James Nicholson, Tab 16, Email to Minister Moore Discussing Requirements Imposed Upon Carriers, dated June 21, 2015.
[204] Exhibit 62, Cross Examination Brief Prepared for James Nicholson, Tab 16, Email to Minister Moore Discussing Requirements Imposed Upon Carriers, dated June 21, 2015.
[205] Exhibit 1, Joint Brief of Documents, Section 333, Email to Minister Moore Attaching Letter to Bill Aziz, the Monitor, and Telus Notifying that Review May Take Twelve Weeks or Longer/Letter from Peter Hill (Industry Canada) to Bill Aziz (BlueTree Advisors Inc.), Biran M. Denega (Ernst & Young Inc.), and Stephen Lewis (Telus) re: process and timeframes under the Radiocommunication Act and Spectrum Licence Transfer Policy dated June 22, 2015.

to Nicholson, who then forwarded precisely three minutes later to James Maunder, Chief of Staff for the Minister of Industry.

472. Hill's letter was manufactured to directly interfere in the bidding between TELUS and Rogers for Mobilicity. It was manufactured at the request of the Minister's Office and the instructions were conveyed to Hill, who implemented them. The letter had precisely the desired effect. It directly interfered with the economic relations among TELUS, Rogers, and Mobilicity (and arguably, Wind) and prematurely terminated the robust bidding war between TELUS and Rogers for the Mobilicity licences.

473. At trial, the Government offered no purported explanation for the letter and did not challenge Nicholson's evidence as to its intent and purpose (which in any event were confirmed to have been corroborated by his contemporaneous electronic mail communications).

474. Yet, Hill was evasive when confronted with the obvious involvement of the Minister's office and department officials at Industry Canada regarding the June 22 letter. Nicholson's evidence, as set out above, was crystal clear, if unhelpful to the Defendant.

475. Hill, who was Nicholson's counterpart in the scheme, would not agree with Nicholson's description of the events. His evidence was that neither he nor Gillis had any contact with Nicholson or Maunder in the Minister's office regarding the substance of the June 22 letter, although he "possibly communicated more with the Minister's office "from a communications perspective".[206]

476. Nicholson's evidence was that he and Hill "definitely had a discussion." Nicholson, however, suggested that "[s]ending this letter with this content was actually Mr. Hill's idea."[207] I reject the suggestion that it was Hill's idea.

477. In sum with respect to these events, I am satisfied that:

a. the *2013 Transfer Framework* offered no basis for the withholding of approval of the proposed TELUS transaction (as a condition of which the Mobilicity Eastern Ontario licences would be transferred to Wind or returned to Industry Canada);

b. both Hill and Gillis knew this;

c. Hill would have approved, and in fact already had approved the proposed TELUS transaction because it complied with the *2013 Transfer Framework*;

[206] Cross-Examination of Peter Hill, December 15, 2023, Transcript, at p. 2951.
[207] Cross-Examination of James Nicholson, December 21, 2023, Transcript, at p. 3655.

d. the office of the Minister directly interfered with the regulatory process (and the Mobilicity sales process)and directed Hill to send the June 22, 2015 letter specifically to further the interests of Wind, which held "the hammer";[208] and

e. Nicholson was involved in the drafting and approval of the letter and sent it to the Minister within minutes of it being delivered.

478. This 2015 interference was, in my view, a clear breach of the duty owed by the Defendant.

479. It brought an abrupt and premature end to the bidding war for the Mobilicity licences. Rogers was the only remaining viable bidder.

480. On June 24, Hill approved the application submitted on June 23 (yet again – just one day prior to approval) by Aziz, Rogers, and Wind regarding an integrated series of Licence Transfers and Subordinate Licences involving those parties.[209] This series of transactions contained 27 licence transfers, including all ten Mobilicity licences.

481. Ultimately, Rogers purchased the ten Mobilicity licences for $465 million.

Did the Breaches of the Standard of Care Cause Harm to the Plaintiffs?

482. Having found a breach of the duty of care, I must consider whether Industry Canada's conduct caused the harm alleged by the Plaintiffs.

483. Again, I turn to the decision of the Court of Appeal in *Aylmer*:

> [87] For it to incur liability for damages, the Ministry's conduct must have been a cause-in-fact of Aylmer's injury, based on the well-known "but for" test in *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at paras. 6-10; and, *Donleavy v. Ultramar Ltd*., 2019 ONCA 687, at para. 63, *per* van Rensburg J.A.
>
> [88] The Ministry must also have been the cause-in-law of Aylmer's injury. That is, the risk of the actual injury suffered by the plaintiff as a result of the defendant's wrongful conduct must not be so remote that it would not be foreseeable to a reasonable person in the defendant's position: *Deloitte & Touche v. Livent Inc. (Receiver of),* 2017 SCC 63, [2017] 2 S.C.R. 855, at para. 79. And, see *Mustapha v. Culligan of Canada Ltd.,* 2008 SCC 27 (CanLII), [2008] 2 S.C.R. 114, at para. 13, citing *Overseas*

[208] Exhibit 62, Cross-Examination Brief Prepared for James Nicholson, Tab 15, James Nicholson of IC Summarizes Strategies with respect to Rogers- WIND and Telus- Mobilicity Transactions dated June 20, 2015.
[209] Exhibit 2, Joint Book of Admitted Regulatory Requests and Decisions, Tab 29, Minister approves transfer of Shaw spectrum licences to Rogers and Mobilicity spectrum licenses to Wind, dated June 24, 2015.

Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty., [1967] A.C. 617 (P.C.), at p. 643.

484. The Plaintiffs submit that each of these main actionable wrongs: i) the 2006 – 2008 misrepresentations and the implementation of the *2013 Transfer Framework* to remove the transferability of the licences to an incumbent after five years, and ii) the interference in the Mobilicity sales process in 2014 and 2015, directly caused the losses they claim.

485. The Defendant submits that the Government did not cause or contribute to any losses claimed by the Plaintiffs and that the Plaintiffs lost their investments because Mobilicity was not successful for a variety of reasons within the ordinary course of business. Moreover, the Defendant submits that when the company was finally sold in 2015 (within the *CCAA* Proceeding), the Plaintiffs recovered what was a small proportion of their investments because they had subordinated their investments to other creditors.

486. In my view, the actions of the Government in making the representations about licence transferability and then implementing the *2013 Transfer Framework,* and in interfering in the sales process in 2014 and 2015*,* directly caused and contributed to the losses that the Plaintiffs claim.

487. The most important point is fundamental yet straightforward: the Plaintiffs invested on the basis that, after a period of five years, they would be permitted to transfer (i.e. sell, just as they had bought) their spectrum licences to Incumbents.

488. As a result of the actions of the Defendant, and in particular the implementation of the *2013 Transfer Framework* which prohibited that very thing, and then the interference in successive sales processes, which directly caused the early termination of the bidding process, the Plaintiffs suffered damages. The Plaintiffs' losses were the direct and indeed intentional result of the Defendant's conduct.

489. The immediate and direct effect of the implementation of the *2013 Transfer Framework* is discussed above.

490. Similarly, I am satisfied that the actions of the Defendant in 2014 and 2015 also directly caused and contributed to the losses claimed by the Plaintiffs.

491. The 2014 threats to TELUS that it would be (improperly) excluded from the 2500 MHz spectrum auction if it continued to pursue the Mobilicity licences, implemented in part, through the contrived and planted Globe & Mail article, were wholly improper and inconsistent with the duties of a regulator as candidly conceded in cross-examination by Gillis and Hill.

492. That misconduct is all the more troubling since it occurred in the context of an attempt to thwart a court-ordered mediation process and circumvent the lawful exercise

of the jurisdiction of the *CCAA* court by considering a motion for a compelled assignment of the licences, pursuant to s. 11.3 of the *CCAA*.

493. The 2015 direct interference in the auction and bidding war also caused and contributed to the losses claimed by the Plaintiffs. The evidence was clear, in my view, that it artificially terminated the bidding war. As noted above, Aziz described the tactic as a "stiff arm" to the TELUS transaction.[210] Huber's evidence was that it "effectively terminated" the sales process."[211]

494. Prior to the termination of the sales process, TELUS had bid $547 million for the Mobilicity licences with, as also discussed above, Aziz testifying that he believed that the bidding would only increase. As such, the premature termination of the sales process harmed the Plaintiffs in that the $465 million Rogers deal resulted in the Plaintiffs not recovering a higher amount for the sale of their spectrum licences.

Negligent Misrepresentation

495. As stated above, the Plaintiffs claim in negligent misrepresentation as well as negligence. As negligent misrepresentation is one example of the broader tort of negligence, many of the elements in the analysis overlap. Indeed, the Defendant itself submits in its Closing Submissions that "with respect to the initial alleged representations, those claims are duplicative of the negligent misrepresentation argument and merit no independent analysis."[212]

496. However, for completeness, I have separately addressed negligent misrepresentation to the extent necessary.

497. The elements of the cause of action in negligent misrepresentation were set out by the Supreme Court in *The Queen v. Cognos Inc.,* [1993] 1 S.C.R. 87, at para. 34:

a. the existence of a duty of care based on a "special relationship";
b. an untrue, inaccurate, or misleading representation;
c. negligence in making the representation;
d. reasonable reliance by the party to whom the representation was made; and
e. damages resulting from the representation.

498. Such a special relationship will be found to exist where the party making the representation should reasonably foresee that his statements will be relied upon by the plaintiff and reliance by the latter would be reasonable in the circumstances. Absent policy considerations negating that *prima facie* duty of care, its breach will attract liability in tort: *Hercules Managements Ltd., v. Ernst & Young, et al*, [1997] 2 S.C.R. 165, at pp. 186-188, and p. 200, citing *Haig v. Bamford et al*., [1977] 1 S.C.R. 466.

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[210] Examination-in-Chief of William Aziz, December 1, 2023, Transcript, at p. 597.
[211] Examination-in-Chief of Michael Huber, December 5, 2023, Transcript, at p. 1178.
[212] Defendant's Closing Submissions, at para. 16.

499. A statement on the part of a public authority, implying a commitment about the way it will deal with private parties or the way in which a regulated entity will be treated by the government is actionable when it is incorrect and made without due care: *OPSEU v. Ontario*, [2005] O.J. No. 1841, at paras. 33-34, citing *Moin v. Blue Mountains (Town)* (2000), 135 O.A.C. 278 (C.A.), at para. 20.

500. Public authorities are liable for negligent misrepresentation on the same basis as private actors: *Gauthier*, at para. 17. A statement on the part of a public authority, implying a commitment about the way it will deal with private parties or the way in which a regulated entity will be treated by the government is actionable when it is incorrect and made without due care: *OPSEU v. Ontario*, at paras. 33-34.

501. I have set out in the above negligence section the basis for my finding that a duty of care existed.

502. The untrue, inaccurate, or misleading representations are also set out above: the key representation being that the spectrum licences could be transferred to an Incumbent after five years.

503. I have also set out above the negligence in making the representations: the breach of the duty of care owed.

504. Also, for the reasons set out above, the reliance by the Plaintiffs, as parties to whom the representation was made, was reasonable.

505. The evidence as to reliance was clear. Four witnesses (Bitove, Lyons, Huber and McSweeney), each testified that they would not have invested/loaned but for the representations regarding the transferability of the spectrum licences.[213]

506. Huber further testified that Quadrangle would not have invested to capitalize Mobilicity as a lack of transferability [of the licences] would have all but negated any options if the business was unsuccessful.[214]

507. The Defendant did not successfully challenge on cross-examination the evidence of any of these witnesses with respect to this point.

508. Negligent misrepresentation is one manifestation of negligence. I have addressed the balance of the elements of the torts in the section above.

509. I address the issue of damages below, following liability.

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[213] Examination-in-Chief of John Bitove, November 30, 2023, Transcript, at pp. 382-383; Examination-in-Chief of Stewart Lyons, December 4, 2023, Transcript, at pp. 797-798; and Examination-in-Chief of Michael Huber, December 5, 2023, Transcript, at pp. 1053-1057.

[214] Examination-in-Chief of Michael Huber, December 5, 2023, Transcript, at p. 1051.

Breach Of Contract

510. The Plaintiffs also claim that Industry Canada breached their contract. The allegation is that Industry Canada made an offer to the Plaintiffs by inviting them to bid on the spectrum licences with prescribed attributes including the term that such licences would be transferable to an incumbent carrier after the expiry of the five-year moratorium. By purchasing the spectrum licences through the auction, the Plaintiffs accepted that offer, giving rise to an enforceable contract.

511. The Plaintiffs submit that by implementing the *2013 Transfer Framework*, the Defendant breached the contract by unilaterally and fundamentally amending the contractual terms and effectively prohibited the sale of Mobilicity on the most favourable terms, since Industry Canada would not approve the transfer of the spectrum licences.

512. The Plaintiffs claim that the Defendant breached the contract a second time in 2015 by unlawfully obstructing the application of the *2013 Transfer Framework* that deemed the proposal from TELUS to be compliant.

513. The Defendant denies there was any contract in the first place. It denies that there was any intention to contract, any consideration, or any certainty of terms. In the alternative, and if the auction framework constitutes a contract, the Defendant denies that there was any privity.

514. First, I am satisfied that public authorities are subject to the private law of contract and can be liable for damages caused by contractual breaches as would be a private party: *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, at para. 46, where the Supreme Court stated:

> 46 In a nation governed by the rule of law, we assume that the government will honour its obligations unless it explicitly exercises its power not to. In the absence of a clear express intent to abrogate rights and obligations – rights of the highest importance to the individual – those rights remain in force. To argue the opposite is to say that the government is bound only by its whim, not its word. In Canada this is unacceptable, and does not accord with the nation's understanding of the relationship between the state and its citizens.

515. Foundational principles of contractual interpretation apply to contracts with public authorities. When interpreting contracts, the court's overriding concern is to determine "the intent of the parties and the scope of their understanding": *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, quoted in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 47.

516. The court does this by "read[ing] the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract:" *Sattva*, at para. 47.

517. Courts should strive to give effect to "a commercial bargain that was intended to have legal effect where a clause in an agreement – even if not precisely expressed – has an ascertainable meaning": *Mapleview-Veterans Drive Investments Inc. v. Papa Kerollus VI Inc. (Mr. Sub),* 2016 ONCA 93, 393 D.L.R. (4th) 690, at para. 29.

518. A contractual term may also be implied "where necessary to give business efficacy to the contract or where it meets the 'officious bystander' test", but the focus must be on the intentions of the actual parties rather than those of hypothetical "reasonable parties": *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, at para. 29; and see *Energy Fundamentals Group Inc. v. Veresen Inc.*, 2015 ONCA 514, 388 D.L.R. (4th) 672, at para. 30.

519. The court should examine the surrounding circumstances to better understand the mutual and objective intentions of the parties, as expressed in the text of the contract: *Sattva*, at para. 57.

520. Relevant surrounding circumstances are limited to background facts that were known, or ought reasonably to have been known, by both parties at or before the date of contracting: *Sattva*, at para. 58; and *Corner Brook (City) v. Bailey*, 2021 SCC 29, 460 D.L.R. (4th) 169, at para. 49.

521. In a commercial context, the surrounding circumstances include the genesis of the transaction, the background, the purpose of the agreement, and the market in which the parties are operating: *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L. U.K.) quoted in *Sattva*, at para. 47.

522. The surrounding circumstances can include anything that "would have affected the way in which the language of the document would have been understood by a reasonable man": *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L. U.K.), at p. 114, quoted in *Sattva*, at para. 58.

523. The court should follow a practical, common sense approach focused on the contractual intent of the parties: *Seelster Farms et v. Her Majesty the Queen and OLG*, 2020 ONSC 4013, at para. 163, citing *Sattva.*

524. Public authorities can enter into a binding contractual relationship even in the absence of a formal contract, so long as the essential terms and contractual underpinnings are present and the parties have manifested the intent to be bound: *Seelster*, at paras. 175 and 178.

525. Clearly, public authorities (including the federal Government) can and regularly do enter into contracts with private parties. It follows that public authorities can be liable for the breach of such contracts. That is not seriously disputed.

526. The more challenging questions here are whether there was a contract, and even if there were, whether these Plaintiffs can maintain an action on it.

527. The Defendant submits that the spectrum licences issued here are "statutory privileges" and not commercial contracts, such that the existence and scope of the licences are governed by regulatory law, not contract law. The licence attributes are legal privileges, not contractual terms, and they are governed by statutory provisions, not the terms of any contract. The Defendant denies that there was any intention on the part of the Government, let alone "very specific and convincing evidence" of an intent by the Crown to be bound contractually in the activity of licencing. [215]

528. I accept the submission of the Plaintiffs that a spectrum licence can be property. Courts have held that licences, including spectrum licences, can be forms of personal property capable of being bought and sold subject to applicable conditions: *Inukshuk Wireless Partnership v. NextWave Holdco LLC et al*, 2013 ONSC 5631, 117 O.R. (3d) 206, at paras. 42-43, citing with approval *UBS Wireless Services, Inc. v. Inukshuk Wireless Partnership*, [2008] O.J. No. 1704.

529. I am reinforced in this conclusion by the mechanism through which the spectrum licences here were granted – the auction process discussed at length above. Again, this was not a situation where the Government issued a permit or "statutory privilege" pursuant to an administrative process for either no fee or an administrative licencing fee.

530. Instead, the spectrum licences were sold to the highest bidder pursuant to a competitive auctioning process at very significant cost. There was no pretense or suggestion that the amounts paid for the spectrum licences (in this case, $243 million) were any proxy for the costs associated with administering the statutory regime. The Government encouraged investors to bid, acknowledged external financing may be required, prescribed payment terms, and set out consequences for default.

531. However, I am not satisfied in the particular circumstances of this case that the requisite elements of a contract have been made out here.

532. First, I am not satisfied that the Plaintiffs have established certainty as to the terms of the contract. It is not clear to me from the evidence or the submissions of the parties, precisely what the terms of the alleged contract are.

533. Even if a spectrum licence can be property, as I am satisfied it could be, the Plaintiffs rely on the clear terms and conditions of the licences, but also claim that the terms of the contract go beyond the licence itself and include other documents and terms incorporated by reference.

534. In their submissions, the Plaintiffs claim that the Government made an offer directly to Obelysk and Quadrangle in their respective capacities as investors to

[215] Defendant's Closing Submissions, at paras. 435-454.

incentivize them to establish, launch and build a new wireless network. The Plaintiffs claim that the offer was made orally and "in instruments incorporated by reference into the licence received at auction".[216]

535. However, it is not clear precisely what those instruments incorporated by reference include. They would seem to include the Auction Framework, but it is not clear to me which of all the documents described above in the section on the "Regulatory Framework" would constitute contractual terms, the breach of which would give rise to liability in contract.

536. The Plaintiffs themselves appear, at least implicitly, to accept that the contract is the licence, since they concede that "the Plaintiffs here are not direct parties to the contract with Industry Canada".[217]

537. Accordingly, I am not satisfied that there is certainty as to the contractual terms.

538. Second, and if the spectrum licences are contracts, or at least the principal if non-exclusive documents embodied in such contracts, and even if there were certainty as to the terms of the contracts, the Plaintiffs are not parties thereto. It seems to me that the parties to the licences are the licensor (Industry Canada) and the licencee (Mobilicity).

539. This challenge is recognized, at least implicitly, by the Plaintiffs who submit that the contract is between the Government and them,[218] while additionally submitting that the contract arises from the Government offer *made to them.* However, they continue on to submit that Mobilicity was the party who accepted the "offer" by bidding on, and ultimately receiving the spectrum licences.

540. The Plaintiff Quadrangle had no contact with Industry Canada during the relevant period of time. The evidence of Binder (who is alleged to have made the first offer concerning the transferability feature of the licences) was to the effect that he was not aware of Quadrangle as being associated with Bitove until after he had left industry Canada in 2008.[219]

541. As observed by the Supreme Court, "the rule in *Foss v. Harbottle* provides that individual shareholders have no cause of action in law for any wrongs done to the corporation": *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 59. However, this does not preclude a shareholder from bringing a separate and distinct claim if they are also personally wronged: *Hercules*, at para. 62; *Tran v. Bloorston Farms Ltd.*, 2020 ONCA 440, 151 O.R. (3d) 563 ("*Tran*"), at para. 33.

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[216] Plaintiffs' Closing Submissions, at para. 487.
[217] Plaintiffs' Closing Submissions, at para. 506.
[218] Plaintiffs' Summary of Legal Issues, at para. 12.
[219] Examination-in-Chief of Michael Binder, December 19, 2023, Transcript, at p. 3071.

542. Moreover, there is an exception to the rule if the company has no cause of action. If a company suffers a loss but has no cause of action, and a shareholder does have a cause of action, then the shareholder may sue for damages including for loss or diminution of share value: *Tran*, at paras. 45 and 63.

543. I accept and agree with the submission of the Defendant, relying on *Tran*, that neither of the exceptions identified in that case apply here. Mobilicity itself would have had a cause of action, yet it never brought a claim. Moreover, there is not both an "independent relationship" with the wrongdoer and an "independent loss" suffered by the plaintiffs different from that of Mobilicity itself. The contractual losses claimed by the Plaintiffs are derivative to the contractual claim of Mobilicity itself.[220]

544. In *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108, at para. 32, the court introduced a general principled exception to privity of contract for third-party beneficiaries. This exception applies if:

a. the parties to the contract intended to extend the benefit in question to the third party seeking to rely on the contractual provision, and

b. the activities performed by the third party are the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intention of the parties.

545. In Ontario, this exception can be used by third-party beneficiaries as a sword as well as a shield: *Brown v. Belleville (City)*, 2013 ONCA 148, 114 O.R. (3d) 561, at paras. 110-111 [although obiter], *Seelster Farms Inc. v. Ontario*, 2020 ONSC 4013, at paras. 185-191, and *Gilani v. BMO Investments Inc.*, 2021 ONSC 3589, at para. 175.

546. The Plaintiffs rely on *Gilani* for their submission that, even where a party is not specifically named in the contract, it will be able to enforce the agreement where it is a member of an "ascertainable group or class of persons" who were "squarely in the contemplation of the contracting parties." This flows from paras. 174-177, where the court expressed the law related to third-party beneficiaries as follows:

> [174] A third party can enforce the terms of a contract if: (i) there is an intention, explicit or implicit, on behalf of the contracting parties to extend the benefit of a contractual provision to the third party; and (ii) the conduct or issue comes within the scope of the contract: *London Drugs Ltd. v. Kuehne & Nagel International Ltd*., 1992 CanLII 41 (SCC), [1992] 3 S.C.R. 299; *Fraser River Pile and Dredge Ltd v. Can-Dive Services Ltd*, 1999 CanLII 654 (SCC), [1999] 3 S.C.R. 108, at paras. 28 and 32;

[220] It is worth observing that the Defendant conceded that, unlike the claims in contract, the claims in negligent misrepresentation are not derivative and can be asserted directly by the Plaintiffs: Defendant's Closing Submissions, at para. 483.

> *Brown v. Belleville (City),* 2013 ONCA 148, 114 O.R. (3d) 561, at para. 98.
>
> [175] The principled exception to the privity rule can be used as a defence, as well as by a plaintiff to enforce terms of a contract against a defendant: *Brown*, at paras. 110-111; *Seelster Farms Inc. v. Ontario*, 2020 ONSC 4013, at paras. 190-191.
>
> [176] There is no requirement that the third party be specifically named in the agreement in order to be a beneficiary. It is sufficient for them to be an "ascertainable group or class of persons" to whom the conferral of a benefit is intended: *Brown*, at para 101; *Seelster Farms*, at paras. 23, 196-198, 201.
>
> [177] Third party beneficiaries must be "squarely in the contemplation of the contracting parties": *Seelster Farms*, at para. 196.

547. The Plaintiffs submit that they are third-party beneficiaries of the contract here, just as the plaintiffs were in *Seelster* and *Gilani*. They rely on *Seelster* as a relevant example of a situation involving a government authority in which the court found that the parties intended to extend the benefit of the contract to the third party seeking to claim under it, and the claim of that third party falls within the scope of the contract.

548. In the circumstances of this case, I am unable to conclude that the Plaintiffs would fit within the third-party beneficiary exception to the general rule requiring privity of contract, even if there were an enforceable contract in the first place. None of the cases relied on by the Plaintiffs deal with a corporation's shareholders trying to claim third party beneficiary status.

549. Moreover, and while, as the Plaintiffs submit, the Court of Appeal in *Gilani* at para. 177 clearly stated that the third-party beneficiary must be "squarely in the contemplation of the contracting parties" that requirement is a necessary condition, but is not on its own a sufficient condition. It must also be the case, as the Court of Appeal observed at para. 176, that the plaintiff not specifically named but part of an ascertainable group or class of persons, be such a group or class "to whom the conferral of a benefit is intended".

550. In my view, the test as established in *Fraser River*, summarized in *Gilani* at para. 174, remains. While it is critical that the party to the contract has considered and contemplated the third-party beneficiary, the focus of the analysis is on the intention of the parties (explicit or implied) to confer a benefit on the third party.

551. Further still, in this particular case, it is also not sufficient. Even if the parties to the alleged contract intended to confer a benefit on the Plaintiffs, the rule in *Foss v. Harbottle* would still be a challenge for them. This is particularly so since, as noted above, it is also not clear what the Plaintiffs submit constitutes the contract. In their

submissions, the Plaintiffs refer to an "unwritten" contract created by the auction process, rather than referring exclusively to the spectrum licences as contracts.[221] If that is an, albeit implicit, acknowledgement of the submission of the Defendant that a spectrum licence is not a contract, the requirement that there was a specific intention on the part of the Government to benefit specific shareholders of an unwritten contract arising out of the auction process is even more challenging.

552. *Gilani* dealt with a trust and unit holders to that trust. *Seelster* dealt with horse breeders who were affected by changes at a racetrack. *Brown* dealt with purchasers of land bought from a person who had previously contracted with the city. *Fraser* was about insurers, and *London Drugs* was about claims against third party employees. None of those situations is completely analogous here.

553. Third, and even if I were satisfied that the Plaintiffs were third-party beneficiaries with corresponding rights under the contracts when entered into (i.e., February 10, 2009, the date the licences were issued), they lacked such rights as of the date that this action was commenced. By that date Mobilicity had been sold following a court-supervised sales process run in the context of its insolvency proceeding. At that point, the Plaintiffs were not even shareholders of Mobilicity. If they were ever third-party beneficiaries entitled to bring an action in contract, they lacked that standing by the time this action was brought.

554. The challenge for the Plaintiffs is that the licencee, Mobilicity, is not a Plaintiff.

555. For all these reasons, the claim for breach of contract is dismissed.

556. I note for completeness that the Defendant relies on s. 16 of the spectrum licences discussed above in connection with the breach of contract claim. The Defendant submits that even if there was a contract, no claim for breach of contract can succeed by operation of s. 16 that provides that the Minister retains the discretion to amend the terms and conditions of licence at any time.

557. Since I have already found that the Plaintiffs' claim in breach of contract cannot succeed in any event, it is not necessary for me to address this point further. However, and for completeness, had I found there was a contract, I would not have found that s. 16 operated as the Government submits it does in any event, for the same reasons as discussed above in the negligence section.

Intentional Interference with Economic / Contractual Relations

558. The Plaintiffs also allege that the Defendant is liable for unlawful interference with economic relations since Industry Canada:

a. in 2014, intentionally ran a course of intimidation targeted at TELUS and designed to frustrate any possible sale of Mobilicity thereby preventing the

[221] Plaintiffs' Summary of Legal Issues, at para. 14.

Plaintiffs from realizing returns on their significant investments in the spectrum at a time when the company was "treading water";

b. in 2015, unlawfully withheld preliminary approval for the proposed acquisition of Mobilicity by TELUS for the purpose of preventing TELUS from continuing to bid against Rogers to acquire Mobilicity, thereby frustrating Mobilicity's ongoing sales process, forcing it to accept the offer from Rogers, and preventing the Plaintiffs from achieving maximum value for Mobilicity derived from its spectrum licences.

559. The tort of unlawful or intentional interference with economic relations can apply where a defendant intends to injure the economic interests of the plaintiff; it does so by unlawful means; and the plaintiff suffers economic harm as a result: *Grand Financial Management Inc. v. Solemio Transportation Inc.,* 2016 ONCA 175, 395 D.L.R. (4th) 529, at para. 62.

560. The Supreme Court of Canada explained the policy rationale underlying this tort in *AI Enterprises Ltd. v. Bram Enterprises Ltd*., 2014 SCC 12, [2014] 1 S.C.R. 177, at para. 23:

> a person [has] a general freedom to participate in the commercial … market and a legitimate expectation that the basic rules of the game will be respected. To the extent that the defendant intentionally inflicts economic loss on the plaintiff through unlawful means which are clearly off-side those basic rules, the defendant gains an illegitimate advantage and causes the plaintiff to suffer an unfair disadvantage.

561. Quoting with approval from that case, this court has found that the tort is made out where:

a. the defendant commits an unlawful act against a third party (i.e., an act that would be actionable if the third party had suffered loss); and,

b. the defendant intends to economically harm the plaintiff or he or she intentionally harms the plaintiff for some ulterior purpose.

See: *Crown Crest Financial Corp. v. Sabbah*, 2019 ONSC 7114, at para. 41.

562. In my view, the key element of the tort at issue here is the intentionality. It is not sufficient if the loss suffered by a plaintiff is merely a foreseeable consequence of the actions of the defendant. There must be a causal connection between the unlawful means and the loss suffered by the plaintiff: *Alleslev-Krochak v. Valcom Limited*, 2010 ONCA 557, 322 D.L.R. (4th) 193, at para. 30.

563. While, as observed above, I have no difficulty concluding that the harm to the Plaintiffs was not only a foreseeable consequence of the actions of the Government but

was in fact foreseen, I am not persuaded that the Government specifically intended to harm the Plaintiffs here (even though it specifically targeted them) as opposed to being indifferent to the harm caused to Mobilicity and the Plaintiffs by its conduct.

564. Moreover, this tort involves a three-way dynamic among parties: the Plaintiffs, the Defendant, and the third party through which it is alleged the unlawful act was committed.

565. The relevant third parties here are one or both of Rogers and TELUS. The challenge is that the commercial arrangements alleged to be interfered with by the Minister and Industry Canada involved Mobilicity, not the Plaintiffs. I note that the Plaintiffs called no evidence from any representatives of Rogers or TELUS with respect to any alleged interference in their economic relations with Mobilicity.

566. If a claim of intentional interference with contractual or economic relations can be made, it must be made by the party whose contractual relations were interfered with, and in this case that is Mobilicity. In my view, the tort is not available (unless brought, for example, by way of a derivative action in the name of the corporation) by shareholders, and/or creditors of the party whose contractual interests have been interfered with.[222]

567. No party has ever sought, nor been granted leave to bring such a derivative action. It is not in dispute that this action is brought by the Plaintiffs to recover damages that they claim are owing to them. The Plaintiffs neither assert claims on behalf of Mobilicity nor seek to recover damages owing to Mobilicity.

568. I recognize that on a r. 21 motion, this court previously declined to strike the Statement of Claim on the basis that the claim was derivative: 2015 ONSC 1521. However, that decision was made on the basis that the claims were not derivative, and the way they were pleaded was such that Mobilicity could not have advanced them.

569. It was following that motion decision that the Plaintiffs amended their pleading to assert this tort as having been specifically targeted at them as individual parties. The Plaintiffs assert that the damages claimed are independent from the damages suffered by Mobilicity[223].

570. The Defendant concedes that the claims of misrepresentation, made before Mobilicity was even incorporated, are not derivative of the claims of Mobilicity (just as this court previously found).[224] However, the Defendant submits, and I agree, that the unlawful means tort involving Mobilicity, Rogers and TELUS is different and must be asserted by one of those parties; i.e., Mobilicity.

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[222] As described above, the Plaintiff Quadrangle Group LLC was never a shareholder of Mobilicity but only a creditor.
[223] Second Fresh as Amended Statement of Claim dated June 29, 2022, at paras. 130-131.
[224] Defendant's Closing Submissions, at para. 483.

571. In my view, this claim cannot succeed.

Unjust Enrichment

572. In their Closing Submissions, the Defendant addressed the Plaintiffs' claim for unjust enrichment and specifically the Plaintiffs' allegation of how and why the Government was unjustly enriched, and why the Defendant denied any unjust enrichment.

573. The Plaintiffs did not address a claim for unjust enrichment in their Closing Submissions, so it is unclear as to the extent to which it is pursued. However, it is pleaded in one single paragraph in the Second Fresh as Amended Statement of Claim in which the Plaintiffs allege that Industry Canada was unjustly enriched by the participation of the Plaintiffs in the spectrum auction, that there was no juristic reason for the enrichment since Industry Canada "failed to provide any of the benefits, on the basis of which [the Plaintiffs] spent the money, with the result that they suffered a corresponding deprivation for which there is no juristic reason".[225]

574. Accordingly, and for completeness, I have addressed the issue.

575. In *Moore v. Sweet*, 2018 SCC 52, [2018] 3 S.C.R. 303, at para. 35, the Supreme Court outlined the doctrine of unjust enrichment as applying:

> when a defendant receives a benefit from a plaintiff in circumstances where it would be "against all conscience" for him or her to retain that benefit. Where this is found to be the case, the defendant will be obliged to restore that benefit to the plaintiff.

576. The doctrine of unjust enrichment contains a three-part test. To succeed, the plaintiff must show:

a. that the defendant was enriched;

b. that the plaintiff suffered a corresponding deprivation; and

c. that the defendant's enrichment and the plaintiff's corresponding deprivation occurred in the absence of a juristic reason.

See: *Moore*, at para. 37, citing *Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 848; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 30; *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, at paras. 30-45.

[225] Second Fresh as Amended Statement of Claim dated June 29, 2022, para. 137.

Was the Defendant Enriched and Did the Plaintiffs Suffer a Corresponding Deprivation?

577. The first two parts of the tri-part test are "essentially two sides of the same coin": *Moore*, at para. 41, citing *Peter v. Beblow*, [1993] 1 S.C.R. 980, at p. 1012. To establish an enrichment and corresponding deprivation, the plaintiff must show that something of value – a tangible benefit – passed from the plaintiff to the defendant: *Moore*, at para. 41, citing *Kerr*, at para. 38; *Garland*, at para. 31.

578. The Plaintiffs submit that the Government was enriched, and the Plaintiffs were correspondingly deprived, of the $243,159,000 that the Plaintiffs bid in the 2008 AWS Spectrum Auction.[226] This is consistent with the manner in which the claim is pleaded: Industry Canada was unjustly enriched by the amount of $243,159,000 being the amount "the Plaintiffs spent in the Spectrum Auction".[227]

579. The Government submits that the Plaintiffs have not established a claim in unjust enrichment: the Government was not enriched; and the Plaintiffs were not deprived. Rather, the Plaintiffs voluntarily incorporated a business, and that business bid $243,159,000 on spectrum licences. The licences were awarded. This was an equal bargain, and moreover it was a bargain between Mobilicity and the Government in any event, not involving the Plaintiffs.[228]

580. I accept the position of the Defendant in this regard. The Government received no benefit for retaining the bid amount. The Government received the amount bid by the Plaintiffs in exchange for use of the spectrum.

581. I am not persuaded that any deprivation suffered by the Plaintiffs corresponds to a resulting benefit enjoyed by the Government. A benefit corresponds to the deprivation for the purpose of an unjust enrichment analysis only if there is a causal connection between the deprivation and the benefit: *Moore*, at para. 43; and *Kerr*, at para. 39.

582. If I am incorrect and there was an enrichment and corresponding deprivation, my conclusion on this issue does not change. As set out below, the Government had juristic reason under the *Radiocommunication Act* and *Department of Industry Act*.

Was the Defendant's Enrichment and Plaintiffs' Corresponding Deprivation in the Absence of a Juristic Reason?

583. The final element of this test requires the Plaintiffs to demonstrate that there is no reason in law or justice for the Defendant's retention of the benefit conferred by the Plaintiffs, and in effect, making the retention unjust: *Moore*, at para. 54.

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[226] Second Fresh as Amended Statement of Claim, dated June 29, 2022, at para. 137.
[227] Second Fresh as Amended Statement of Claim, dated June 29, 2022, at para. 137.
[228] Defendant's Closing Submissions, at para. 458.

584. Justice Iacobucci reformulated the third part of the unjust enrichment test into two stages.

585. First, the plaintiff must demonstrate that the defendant's retention of the benefit at the plaintiff's expense cannot be justified on the basis of any of the "established" categories of juristic reasons: a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations: *Moore*, at para. 57 citing *Garland*, at para. 44; *Kerr*, at para. 41. If any of these categories apply, the analysis ends; the plaintiff's claim must fail because the defendant will be justified in retaining the disputed benefit: *Moore*, at para. 57.

586. If the plaintiff's expense cannot be justified on an established category, then she or he has proven a *prima facie* case. As such, the defendant then has an opportunity to rebut the plaintiff's *prima facie* case by showing that there is some residual reason to deny recovery: *Moore*, at para. 58, citing *Garland*, at para. 45.

587. The Plaintiffs submit that the enrichment and corresponding deprivation occurred for no juristic reason.[229]

588. The Government submits that there are valid juristic reasons supporting its receipt and retention of the auction proceeds from Mobilicity. Namely, the 2008 AWS Spectrum Auction was a properly authorized competitive bidding process for the selection of licences, pursuant to subparagraph 5(1.2) of the *Radiocommunication Act*. It provided for the payment of bids and the corresponding receipt of an opportunity to exploit spectrum.

589. Pursuant to subparagraph 5(1.3) of the *Radiocommunication Act*, the acceptance of bids under subparagraph 5(1.2) is in lieu of the fees otherwise statutorily fixed for this privilege pursuant to s. 19 of the *Department of Industry Act*. The Government submits that the fees paid correspond to an established category of juristic reason – statutory obligation.[230]

590. I accept the position of the Government with respect to the first stage. As such, I need not continue to the second stage of the analysis. The Plaintiffs' claim for unjust enrichment fails.

REMEDY: DAMAGES

591. In the Second Fresh as Amended Statement of Claim, the Plaintiffs claim damages in the amount of approximately $1.2 billion.

592. Tort damages are awarded to put the Plaintiffs in the position that they would have been in but for the negligent act or acts of the Defendant: *Aylmer*, at para. 111,

[229] Second Fresh as Amended Statement of Claim dated June 29, 2022, at para. 137.
[230] Defendant's Closing Submissions, at para. 460.

citing *Athey v. Leonati*, [1996] 3 S.C.R. 458, at para. 32; *Tokarz v. Cleave Energy Inc*., 2022 ONCA 246, at para. 43.

593. The breach of a duty by a public authority makes it liable to compensate the Plaintiffs for the resulting "loss of enterprise value": *Aylmer,* at para. 114.

594. Damages are not assessed differently where the defendant is a government as opposed to a private actor: *Agricultural Research Institute of Ontario v. Campbell High*, (2002) 58 O.R. (3d) 321 at para. 28; citing *Wells*.

595. Not surprisingly, the approach to, and quantification of, damages in this case are vigourously contested.

596. Five experts were properly qualified to offer, and did offer, opinion evidence at trial.

597. Each of the Plaintiffs on the one hand, and the Defendant on the other, called one expert on spectrum valuation (Ms. Johanne Lemay of Lemay Yates Associates ("Lemay") for the Plaintiffs, and Mr. Richard Marsden of NERA Economic Consulting ("Marsden") for the Defendant).

598. Lemay and Marsden testified as to the value of the Mobilicity spectrum licences at different points in time. Their conclusions yield dramatically different valuations for the licences.

599. Each of the Plaintiffs on the one hand, and the Defendant on the other, also called one expert on the quantification of damages suffered by each of the Plaintiffs (Mr. Errol Soriano of KSV Advisory Inc. ("Soriano") for the Plaintiffs, and Mr. Enzo Carlucci of KMPG Inc. ("Carlucci") for the Defendant). The conclusions of these experts also reflect an astonishingly wide range of estimates of damages suffered by the Plaintiffs, ranging from zero to well over CAD $1 billion.

600. Soriano and Carlucci relied upon the conclusions of the spectrum valuation experts (Lemay and Marsden) as part of their respective analyses (i.e., as inputs for spectrum licence value in their broader damages calculations).

601. The parties disagreed on the value of the Mobilicity spectrum licences, and they disagreed on the enterprise value of Mobilicity based on numerous issues. These issues included the appropriate valuation date.

602. In many respects, however, the conceptual approaches of the two damages experts regarding the valuation of Mobilicity's business was similar. The biggest driver of the delta between their respective conclusions arose from the different inputs for the value of spectrum licences at given points in time.

603. Soriano and Carlucci each calculated the enterprise value of Mobilicity by determining the value of its assets at what they considered to be the appropriate valuation date, and then determined what funds would remain to be distributed to the

Plaintiffs after satisfying the interests of creditors and other priority-ranking stakeholders.

604. The Plaintiffs additionally called Mr. Drew Ross of Ross Financial Advisory ("Ross"), an expert investment banker, to offer his opinion with respect to Marsden's use of a second-price approach to the valuation of Mobilicity spectrum licences in June 2015, as compared to standard investment banking practices across North America, and how this relates to an analysis of whether and in what circumstances the highest bid received (or estimated to be received) relates to the appropriate estimate of fair market value for a business.

605. As a general observation with respect to these five expert witnesses, I found each of them to be a careful, competent, and qualified expert.

606. Each of Lemay and Marsden valued the spectrum licences at given points in time. I found both to be forthright.

607. Soriano and Carlucci were also careful and approached their respective mandates with care. While their professional opinions with respect to the matters within their respective mandates differed, to be certain, each was forthright in their evidence and was prepared to concede points as appropriate.

608. The evidence of Ross was clear and direct.

609. I was satisfied that none of the expert witnesses strayed into the territory of being an advocate for the party who had retained them, and each fulfilled their duty.

Approach to Damages Generally: Three Scenarios

610. I have found the Defendant liable for negligence/negligent misrepresentation and allowed the action on that basis.

611. I will assess damages in three scenarios or periods of time:

a. Scenario One: the misrepresentations made in 2006 - 2008 and the implementation of the *2013 Transfer Framework* inducing the Plaintiffs to acquire the spectrum licences in the 2008 AWS Spectrum Auction and invest in the build-out of Mobilicity;

b. Scenario Two: the unlawful conduct in 2014 as described above, consisting principally of the interference in the sales process for Mobilicity through the interference with the motion in the insolvency proceeding for an order compelling the assignment of the licences (brought pursuant to s. 11.3 of the *CCAA*), the "planting" of the manufactured Globe & Mail article, and associated pressure on TELUS to withdraw from pursuing the Mobilicity licences; and

c. Scenario Three: the unlawful conduct in 2015 also as described above, consisting principally of the interference in the bidding war for Mobilicity

within the *CCAA* proceeding, resulting in the premature and artificial termination of that bidding war.

612. Each of these three scenarios is sequential in the context of analyzing tort damages.

613. For Scenario One, I must approach an assessment of damages from the perspective of putting the Plaintiffs in the position they would have been in "but for" the misrepresentations. In other words, they never would have invested in the spectrum licences or in Mobilicity but for their reliance on the representations that they could transfer those licences to an incumbent after the five-year moratorium.

614. It follows that an appropriate award of damages would put them in the position they would have otherwise been in. Namely, they would have invested their funds elsewhere, and a damages award must reflect what they could have earned in an alternative investment, less the amounts they actually recovered.

615. If the Plaintiffs are awarded these damages, in my view, no additional damages flow from either Scenario Two or Scenario Three – the subsequent actionable conduct of the Defendant in 2014 and 2015 – since none of those subsequent events would have occurred in the hypothetical "but for" world for which the Plaintiffs will have already been compensated. To award the Plaintiffs additional damages would over-compensate them in respect of periods of time for which they will have already recovered.

616. It is only if I am in error with respect to liability for Scenario One (the misrepresentations and implementation of the *2013 Transfer Framework*), but I am correct with respect to my findings that the conduct of the Defendant in 2014 and/or 2015 is actionable, that the assessment of damages would be necessarily impacted. In that case, the analysis would assume that there was no actionable misconduct until 2014 and/or 2015, with the result that the analysis of the alternative "but for" world begins at one of those points in time (i.e., Scenario Two or Scenario Three).

617. If damages are awarded based upon the actionable conduct of the Defendant in 2014 (Scenario Two), no additional damages would flow from the actionable conduct in 2015 (Scenario Three), since in this hypothetical scenario, Mobilicity and its licences would have been sold in 2014, and the events of 2015 would never have occurred. It follows that, as above, any award for additional damages in respect of Scenario Three would overcompensate the Plaintiffs.

618. It is only if I am in error with respect to my findings of liability in respect of both Scenario One and Scenario Two that damages that may flow from Scenario Three - the 2015 interference in the sales process - become relevant.

619. The appropriate measure of damages would then be based on the assumption that the bidding war for Mobilicity between Rogers and TELUS would have continued uninterrupted. I must then estimate the value of that loss based on the likelihood of it occurring and then quantifying to the best of my ability the price at which that auction

would have ended (i.e., the value realized for Mobilicity) to form the basis for the quantification of damages.

620. In either Scenario Two or Scenario Three, the analysis must then calculate or estimate the amount the Plaintiffs would have received in respect of their investments based on a sale, from which the amounts ultimately recovered as a result of the actual *CCAA* sale in 2015 must be deducted.

621. I will now consider each of these three Scenarios and assess damages applicable in each case.

Scenario One: Damages for Negligence and Negligent Misrepresentation

622. The starting point for Scenario One is that the Plaintiffs should be put in the position they were in "but for" the negligent acts of the Defendant.

623. In Scenario One, the Plaintiffs claim damages totaling USD $727,004,000 in respect of Quadrangle and CAD $297,770,000 in respect of Obelysk, inclusive of pre-judgment interest.[231]

624. The Defendant submits that in Scenario One, no damages should be awarded, but in the alternative, total damages should be based on the initial investments in Mobilicity totaling $250,000,010, made up of CAD $216,698,000 by Quadrangle and CAD $33,301,410 by Obelysk.[232]

625. The Defendant submits that, in the alternative, and if the Court concludes that Quadrangle should be compensated for all amounts it invested, including the debt financing, it would recover those amounts also, but the calculation of prejudgment interest should be calculated at different points in time to accurately reflect the fact that the financing was provided between May 2009 - October 2012 in tranches, and therefore interest should run from the time the loss was sustained and not from the date of the breach.[233]

626. The principal submission of the Defendant that in Scenario One, no damages are payable notwithstanding the finding of liability, is based on three reasons:

a. but for the misrepresentations and the implementation of the *2013 Transfer Framework*, Mobilicity would have been sold to TELUS, either just prior to the expiry of the five-year moratorium on transfers to incumbents (for $380 million) or shortly thereafter (for $350 million plus the assumption of $22 million in working capital);

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[231] The expert reports prepared by KSV calculated prejudgment interest as of November 30, 2022. As such, this resulted in the Plaintiffs' damages claim being $721, 315,000 (USD) for Quadrangle and $264,342,000 (CAD) for Obelysk.
[232] Defendant's Closing Submissions, at para. 612.
[233] Defendant's Closing Submissions, at paras. 618-620.

b. Mobilicity was in fact sold to Rogers for $465 million in 2015; and

c. as a result, the Plaintiffs were better off from a financial perspective by the actual sale, compared to where they would have been if either the proposed May 2013 TELUS transaction or the April 2014 TELUS transaction had been approved by Industry Canada, since any recovery by the Plaintiffs as a result of either such sale would have been lower than what they ultimately recovered as a result of the Rogers sale in June 2015, and any award of damages compensates the Plaintiffs for business losses unrelated to any conduct of the Defendant.

627. I do not accept this submission for the fundamental reason that it is inconsistent with the "but for" approach used for assessing damages in tort. But for the negligent acts of the Defendant, the Plaintiffs would never have invested in the spectrum licences in the 2008 AWS Spectrum Auction and in the subsequent buildout of Mobilicity. It follows that there would have been no subsequent sale of Mobilicity to TELUS or Rogers in 2013, 2014, or 2015.

628. Rather, in this Scenario One, as acknowledged above, the Plaintiffs would have deployed their capital elsewhere and made alternative investments. Accordingly, I reject the submission that even if liability is established in Scenario One (as I have found it is), no damages are payable.

629. The Defendant then submits in the first alternative, that "in the event that the Plaintiffs establish liability for negligent misrepresentation", damages for the Plaintiffs should be limited to their "out-of-pocket loss" which is equivalent to "the Plaintiffs' initial investments in Mobilicity, totaling $250,000,010. As reflected in KSV's initial report, this sum is made up of CDN $216,698,600 invested by Quadrangle and CDN $33,301,410 invested by Obelysk."[234]

630. In my view, these amounts would represent the absolute minimum to which the Plaintiffs would be entitled in this action. If they invested in the spectrum licences based on the misrepresentations, they ought to be entitled at least to recover the amounts they invested.

631. Moreover, the Defendant "acknowledges that the Quadrangle Plaintiffs advanced an additional USD $91.9 million (CAD $94.9 million) of debt financing." However, it submits that those amounts should not be included in the calculation as "they were not caused by any negligent misrepresentation(s) by the Defendant."[235]

632. I do not accept this submission either. The funds were clearly advanced and would not have been advanced but for the misrepresentations. There is no principled reason to exclude those amounts. They were advanced further to the initial investment required to obtain the spectrum licences at auction and were clearly required for the buildout of the wireless network and general capitalization of Mobilicity, which is not

[234] Defendant's Closing Submissions, at para. 612.
[235] Defendant's Closing Submissions, at para. 613.

disputed. They were advanced prior to the implementation of the *2013 Transfer Framework*.

633. The investment of additional capital beyond the amounts necessary to acquire the licences was not only contemplated but was required by the Defendant from the outset. That was the whole underpinning of the five-year moratorium – to require new entrants who successfully bid for the spectrum licences to continue to invest after acquiring the licences to build a network and remain in the business for a minimum of five years.

634. It follows, in my view, that the plaintiff Quadrangle is therefore entitled to recover these amounts also. These advances are part of the amounts invested, based directly on the misrepresentations of the Defendant. In my view, Quadrangle ought not to be disentitled to recover these amounts because they were advanced to fund the buildout of the network rather than the acquisition of the spectrum licences.

635. However, in my view, such an award of damages, including only the above amounts invested, would not adequately compensate the Plaintiffs for those misrepresentations. It would represent only partial recovery in a "but for" analysis and would essentially provide for return of principal as of 2008, but not compensate the plaintiffs in respect of any reasonable rate of return on that same capital.

636. The Plaintiffs are entitled to damages based on a reasonable rate of return for a suitable portfolio over the relevant time period, as were awarded in *Vipond v. AGF Private Investment Management*, 2012 ONSC 7068, at paras. 215-222. In my view, the same approach applies here. Lost profits can be used as a means of assessing what the Plaintiffs would have earned elsewhere and lost as a result of the misrepresentations.[236]

637. In *Vipond*, the "suitable portfolio" was (necessarily) a hypothetical portfolio, constructed by the plaintiff's expert in that case in a manner consistent with an investment policy statement to which both parties had agreed, and which the court in that case ultimately found was a "legitimate and reasonable basis" on which to calculate the plaintiff's losses. The Plaintiffs here rely on the same approach, although there is no agreement as to appropriate investments to be considered.

638. The Supreme Court has been clear that this court has an obligation to assess damages, even if the quantum is difficult to calculate with precision and particularly if the evidentiary uncertainty results from the misconduct of the Defendant: *C. M. Callow Inc. v. Zollinger*, 2020 SCC 45, 452 D.L.R. (4th) 44, at para. 116; *Eastern Power*

[236] *V.K. Mason Construction Ltd. v. Bank of Nova Scotia*, [1985] 1 SCR 271, at pg. 285. See also *Hayward v. Hampton Securities Ltd.*, 2002 CanLII 53227, at para. 217 (ON SC).

Limited v. Ontario Electricity Financial Corporation, 2010 ONCA 467, 101 O.R. (3d) 81 (C.A.), at para. 39, and *Cassandro v. Glass*, 2019 ONCA 654, at para. 35.[237]

639. The Plaintiffs submit that in the Scenario One "but for" analysis, they would not have invested in Mobilicity and instead would have invested their capital in alternative investment opportunities.

640. But for the misrepresentations, the Plaintiffs would have deployed their capital elsewhere, and not invested in the spectrum licences acquired at auction and the associated wireless network buildout costs. They would have received a return on that capital measured by historical investment returns. There is no basis to apply an assumption that a comparable rate of return would have been zero (i.e., to conclude that two sophisticated corporate investors such as Quadrangle and Obelysk would not have deployed the capital to generate even a simple rate of return).

641. Compensating the Plaintiffs on the basis of estimated rates of return that would have been earned (as the court did in *Vipond*) is appropriate here in Scenario One.

642. I observe as a preliminary matter in this regard that the value of spectrum licences (and therefore the analyses of Lemay and Marsden – calculated as at any point in time) are not relevant to the calculation. In this "but for" scenario, there are no spectrum licences, so any estimated or imputed value of such is irrelevant. The relevant analysis is the hypothetical alternative investment portfolio.

643. As discussed above, the Plaintiffs' damages expert, Soriano, calculates the losses from an alternative investment portfolio as totaling USD $727,004,000 in respect of Quadrangle and CAD $297,770,000 in respect of Obelysk, inclusive of prejudgment interest.

644. Soriano calculated these totals by:

a. determining the amount of capital the Plaintiffs invested in Mobilicity (which is not in dispute);

b. deriving a "but for" rate of return based on other comparable investments actually made by the Plaintiffs;

c. applying that rate of return over a projected holding period (using a period of six – seven years for Quadrangle, which was consistent with its actual holding period for other investments, and also with the standard holding period of similar private equity funds; and using a holding period for Obelysk equal to the average duration of the holding period for other investments of Bitove and Obelysk), all to generate a total estimated value of but-for proceeds;

[237] This approach is consistent with the observation of the New Brunswick Court of Appeal in *Vipond*, where that Court observed that the Crown, being the author of the negligent misrepresentation, "cannot be heard to complain if [the plaintiff's] damages are calculated on the basis of assumptions that admittedly cannot be proven by irrefragable evidence". (para. 28).

d. determining the actual proceeds received by the Plaintiffs from the sale of Mobilicity (also not in dispute);

e. subtracting the actual proceeds received by the Plaintiffs from their expected but-for proceeds from alternative investments; and

f. applying a rate of pre-judgment interest to the total.

645. The Defendant's expert, Carlucci, confirmed that he did not do any comparable analysis because, as he candidly conceded on cross-examination, he was not aware that the Plaintiffs had advanced the misrepresentation claims that underpin Scenario One:

> Q. Thank you. If you could turn to page 46 of this report.
>
> A. Yep.
>
> Q. This sets out your opinion that the scenario 1 approach adopted by KSV is an inappropriate methodology?
>
> A. Sorry, did you say "inappropriate"?
>
> Q. (Nods)
>
> A. I don't agree with it.
>
> Q. Right. Well, these are your words, sir. It says it's an inappropriate loss.
>
> A. That's fair.
>
> Q. I'm just trying to situate you.
>
> A. Yes.
>
> Q. And just to recap, this scenario is the one that, absent the misconduct, alleged the plaintiffs would not have established Mobilicity and would instead have invested in an alternative investment; correct?
>
> A. Correct.
>
> Q. And you say scenario 1 is not appropriate because it compensates Quadrangle for losses that were not the result of the 2013 transfer framework.
>
> A. That's correct.

Q. And they predate the transfer framework, in fact, you're saying?

A. They predate the -- yes, the transfer framework. That's correct.

Q. Right. And specifically, sir, if you look to the third line of paragraph 6.8 –

A. Six point –

Q. Eight.

A. Yep. The third line?

Q. Yes. Do you see it says: "In our view KSV scenario number 1 is not an appropriate methodology to apply in estimating Quadrangle's financial loss due to the alleged actions."

A. That's correct.

Q. And sir, in your report or in your assessment, the alleged actions that you have in mind began in May 2013?

A. Correct.

Q. Sir, are you aware that the plaintiffs have also made additional allegations of misconduct predating 2013?

A. Not -- no, I'm not aware of that.

Q. Could we pull up statement of claim paragraph 122, please. Sir, have you reviewed the statement of claim?

A. I have.

Q. Okay, and this paragraph 122 and the following paragraphs through 128 refer to misrepresentations allegedly made by Industry Canada towards the plaintiffs?

A. Yes.

Q. And if you just scroll through, or perhaps the page after, I'm looking for paragraph 127. All right. Please stop there. And, sir, you see that there is an allegation that: "But for these

Representations DAVE and Quadrangle would never have invested in the Canadian wireless market" [As read.]

A. That's right. Q. These representations, you will agree with me sir, as alleged, took place before 2013?

A. If you can point me to them, I'm not aware of them.

Q. Okay, well, sir, I think the statement of claim is clear that the representations took place before the investment of DAVE and Quadrangle.

A. Okay.

Q. And I suggest that's the logical implication of that paragraph. In fact, the Court has heard evidence about representations taking place as early as 2006. You will agree with me if there were representations between 2006 and 2008 those predated what you have defined as the alleged actions?

A. That would be fair.

Q. And perhaps we could scroll down to the statement of claim, to the balance of paragraph 128. Sir, you will see in the last sentence in paragraph 128 says: "In addition, DAVE and Quadrangle have lost the return on capital they would have earned had the money they invested in Mobilicity been invested elsewhere." [As read.]

A. Yes.

Q. Sir, you understand that the investment in Mobilicity took place in or around 2008?

A. That's correct.

Q. Started?

A. Yes, that's fair.

Q. And so, sir, under this theory the plaintiffs would not have invested in Mobilicity starting in 2008; correct?

A. Correct. Can I make one clarification for the Court? In my evidence I suggested if there was a misrepresentation and they didn't invest their money and they put it elsewhere, I can't speak

to that. It's not for me to speak to. They would have done what they would have done. I'm simply trying to point out for the Court mechanically, compensating damages on the alternative investment theory does give the plaintiffs the return of their full capital that was lost as a result of the operation of the business.

Q. All right.

A. So I'm just trying to make that clarification.

Q. I understand that, sir. We're going to explore that a little bit here.

A. Okay.

Q. So, just to resituate here, these allegations are that representations made before 2013, in other words, before your alleged actions, would have led to the plaintiffs not investing in Mobilicity; correct?

A. That's correct.

Q. Okay, and you will agree, sir, if the plaintiffs had never invested in Mobilicity, the operating losses you discussed with my friend this morning would never have come to pass; correct?

A. That is true.

Q. And if the investment had been made into an alternative investment starting in 2008, those operating losses actually suffered by Mobilicity would not come into play; correct?

A. That's fair.

Q. Sir, you will agree that if the Court accepts the allegations made in these paragraphs of the statement of claim, that a loss valuation methodology based on the alternative investment starting in 2008 would be appropriate, correct?

A. That's fair.[238]

646. Carlucci did, however, fairly concede that if these (Scenario One) claims were made out, a loss valuation methodology based on the alternative investment starting in

[238] Cross-Examination of Enzo Carlucci, December 22, 2023, Transcript, at pp. 3864-3870.

2008 would be appropriate.[239] He further conceded that the mechanics of Soriano's approach were correct and appropriate.[240]

647. In my view, the approach undertaken by Soriano for Scenario One of estimating returns in a hypothetical alternative investment portfolio beginning in 2008, is consistent with the manner in which courts have calculated damages for negligence and negligent misrepresentation, and is appropriate here.

648. However, it still remains to assess Soriano's analysis and the assumptions on which it is based to ensure that a fair and equitable alternative rate of return is used in the analysis.

649. While, as noted above, Carlucci did not undertake his own comparable analysis, he did opine on why, in his view, Soriano's analysis and conclusions would overcompensate the Plaintiffs. Carlucci had three main criticisms of Soriano's approach.

650. Carlucci's first criticism is that the Plaintiffs needed to base their "but for" proceeds on an actual, identifiable, and available alternative investment in 2008, rather than a reasonable hypothetical portfolio on which Soriano relied.

651. First, with respect to this point, I accept the submission of the Plaintiffs that they are not required to demonstrate, within a hypothetical portfolio of comparable investments, a specific, actual and real alternative investment opportunity in which they could have deployed their capital. In my view, the objective of the exercise, as was done in *Vipond*, is to estimate with reasonable assumptions a hypothetical alternative opportunity, not to identify a specific and actual opportunity: *Vipond*, at paras. 216-222.

652. The Court was not directed to any authority for the proposition that such a requirement exists in the circumstances. I am not persuaded that it is appropriate to impose one here.

653. Moreover, and in any event, the Plaintiffs rely on the evidence of Huber and Bitove to the effect that there were numerous business and investment opportunities available generally through the relevant period, and the evidence of Bitove in particular that he likely would have started his investment fund Lumen earlier, but for the investment of Obelysk in Mobilicity. Finally, they rely on the evidence of Carlucci himself that Quadrangle would have had a "multitude of other investment opportunities" at the time.[241]

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[239] Cross-Examination of Enzo Carlucci, December 22, 2023, Transcript, at p. 3870.
[240] Cross-Examination of Enzo Carlucci, December 22, 2023, Transcript, at p. 3902.
[241] Examination-in-Chief of Michael Huber, December 5, 2023, Transcript, at p. 1181; Examination-in-Chief of John Bitove, November 30, 2023, Transcript, at p. 462; Cross-Examination of John Bitove, November 30, 2023, Transcript, at pp. 484-485; Examination-in-Chief of Enzo Carlucci, December 22, 2023, Transcript, at pp. 3837, 3891-3894.

654. It follows, in their submission, that since they in fact invested in Mobilicity in 2008, they had no reason to seek out alternative investments and did not do so, but that they would have been able to identify one or more alternative investments if necessary (i.e., "but for" their investment in Mobilicity). I agree.

655. Finally in this regard, Carlucci himself levels this criticism, but ascribes no dollar value to it. He states: "we have not attempted to quantify the numerical impact of [this critique], as we believe any corresponding analysis would be too speculative. As mentioned below, to the extent that a lack of available and suitable investments were to exist, any reductions in the size of investment and/or delays in the timing of investment, but-for proceeds calculated in KSV's Scenario #1 would be reduced."[242]

656. I agree that it would be speculative. Carlucci's reluctance to ascribe a dollar value attributable to this factor, (instead, effectively submitting that there should be some reduction, but even he cannot accurately estimate the quantum) reinforces my conclusion that such specific alternative investments ought not to be required to be identified since to do so would be, in line with Carlucci's own submission, entirely too speculative.

657. Carlucci's second criticism of Soriano's analysis is that the rate of return for the hypothetical "but-for" portfolio is overstated. Soriano's hypothetical portfolio assumes an annual rate of return of 14.4%, whereas Carlucci's evidence was to the effect that the assumed annual rate of return should be 8.2%.

658. Carlucci submits that 8.2% is a more reasonable estimate for two reasons:

a. Soriano ought to have used the median rather than the average performance of the previous investments of Quadrangle; and

b. the calculation was based on all of Quadrangle's prior investments and ought to have excluded certain of them.

659. I will address these in turn.

660. First, Soriano used a weighted average for determining a rate of return for portfolio investments, arguing that it accurately captures the rate of return achieved across the entire portfolio, rather than simply reflecting the middle investment in the ranking of all investments from top to bottom (i.e., the median).

661. I recognize that Carlucci conceded in cross-examination that the weighted average is the most commonly used method.[243] However, in my view, his approach of using the median here to eliminate the distorting effective outliers is appropriate.

662. I draw additional comfort in this regard from the fact that Soriano himself used the median in his analysis of the alternative investment portfolio for Obelysk, and he

[242] Replacement – KPMG Expert Report (Quadrangle), at 6.14.
[243] Cross-Examination of Enzo Carlucci, December 22, 2023, Transcript, at pp. 3881-3882.

did so for the same reason (in his own words, he removed one "skewing" investment).[244] I agree that that was appropriate, but in my view, the application of the median rather than a weighted average is appropriate for modelling the alternative investments for both Quadrangle and Obelysk (and also makes the conceptual approach to the calculations consistent). I see no principled basis on which they should be approached differently in the circumstances of this case.

663. Second, I accept Carlucci's evidence that in the particular circumstances of this case, certain investments made by Quadrangle (three in particular) should be excluded from the analysis.

664. Soriano based his analysis on Quadrangle's total portfolio internal rate of return ("IRR") across its 13 historic portfolio investments, over a period ranging from August 2005 through September 2020, excluding Quadrangle's investment in Mobilicity. He then calculated his "but-for" rate of return by selecting the rate of return achieved across Quadrangle's entire portfolio cash flows, yielding an annual IRR of 14.4%. That was then compounded annually as part of Soriano's calculations.

665. I agree with Carlucci that the inclusion of three of those 13 investments improperly distorts the analysis since they have significantly different investment characteristics (such as risk-return profiles and holding periods, among others) than did Quadrangle's investment in Mobilicity.

666. Two of those three investments were investments in distressed debt (Intelsat (Bermuda), Ltd.) and NNB Master Holdings II LP). Each of those distressed debt investments had an approximate hold period of one year. This is reflected in the chart below: [245]

Quadrangle's Historic Investments

Investment	Approximate Hold Period	Initial Inv. Date	Invested Capital ($mm) (USD)	Gross IRR
Intelstat (Bermuda), Ltd.	1.0 years	Nov-08	$ 66.5	173.4%
NNB Master Holdings II LP	1.0 years	Dec-08	40.4	176.8%
Alpha Media Group Holdings Inc.	2.0 years	Aug-07	93.0	-100.0%
Cequel Communications Holdings, LLC	6.5 years	May-06	150.0	20.4%
Get AS	7.0 years	Dec-07	199.1	18.0%
DAVE Holdings Inc. (Mobilicity)	**7.5 years**	**Aug-08**	**300.5**	**-32.4%**
NTELOS Holdings Corp.	8.0 years	Sep-07	38.4	-17.5%
Grupo Corporativo Ono, S.A.	8.5 years	Nov-05	133.8	6.5%
Lumos Networks	8.5 years	Sep-07	60.1	-12.8%
Hargray Holdings LLC	10.0 years	Jun-07	131.5	15.3%
DHI Group Inc. (formerly Dice Holdings, Inc.)	10.5 years	Aug-05	67.1	66.7%
Tower Vision Mauritius Limited	10.5 years	Jan-10	153.2	-0.8%
West Corporation	11.0 years	Oct-06	125.0	10.0%
PMC (formerly Mail.com Media Corporation)	12.0 years	Sep-08	30.0	2.4%

Excluded by KPMG based on investment characteristics

667. These two investments (at the top of the chart) generated astonishingly high grossing IRRs: 173.4% and 176.8%, respectively. However, that is directly correlated to the distressed debt nature of the investments and the correspondingly high risk/reward ratio over an extremely short period of time. Moreover, they represented

[244] KSV Expert Report – Plaintiff – Obelysk Inc., at 6.7-6.8.
[245] Exhibit 67, Slide Deck Prepared for Examination of Enzo Carlucci, at p. 26.

what were, in the view of Quadrangle, unique opportunities not necessarily reflective or indicative of its general investing strategy or practice. As Quadrangle noted in the QCP II 2020 Annual Report, it believed that QCP II's investments in its distressed debt instruments:

> represented an attractive opportunity to capitalize on market dislocation and leverage QCP II's sector expertise to realize equity-like returns accompanied by downside protection of senior capital structure positions … while these investments generally played out, the illiquidity and the debt markets at the time, QCP II was investing prevented them from building positions as large as they would have liked to.[246]

668. In my view, those two distressed debt investments were unique and in all relevant respects and characteristics, were qualitatively different than the investment made by Quadrangle in Mobilicity. I agree with Carlucci that they should be excluded. Their risk profile and approximate hold period were materially different than was Quadrangle's investment in Mobilicity.

669. I also agree that one additional investment (coincidentally at the other end of the range – at the bottom of the chart) should also be excluded: PMC (formerly Mail.com Media Corporation). That investment included, as one of its characteristics, a guaranteed rate of return. For that reason alone, it is not comparable in any important respect to the investment in Mobilicity. While the Gross IRR was very low at 2.4% (and therefore the exclusion arguably benefits Quadrangle), I agree with Carlucci's principled approach to include only those appropriate comparators, and excluding inappropriate comparators, to generate an accurate result.

670. In this regard, I reject the submission of the Plaintiffs that excluding these three investments amounts to "cherry picking" or manipulating the sample composition. In my view, they are properly excluded for the reasons articulated by Carlucci. Moreover, I draw additional comfort from the fact that investments were excluded at both ends of the range (i.e., he did not exclude only the highest or the lowest, for example). While it is a coincidence that the approach is balanced, each of these investments is excluded on the basis of its differentiating characteristics, making it materially dissimilar to Quadrangle's investment in Mobilicity.

671. Finally, when considering these first two criticisms together, I observe that Carlucci's median IRR of 8.2% based on excluding Mobilicity and the three selected investments described above, is coincidentally the same as the median including Mobilicity. It is also higher than the combined median rate of return for Canadian and American comparable companies identified by Quadrangle itself at 7.4%.[247]

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[246] Exhibit 67, Slide Deck Prepared for Examination of Enzo Carlucci, at p. 25, citing QCP II 2020 Annual Report, at p. 6.
[247] Exhibit 67, pg. 28.

672. In short, this reinforces my view that an IRR of 8.2% is reasonable in the particular circumstances of this case.

673. Carlucci's third criticism of Soriano's analysis is that it is calculated in US dollars, rather than Canadian funds and that this leads to an inflated financial loss figure. The Plaintiffs challenge this criticism on the basis that Quadrangle was a US-based fund, which made most of its investments in US dollars, with the result that the most reasonable assumption in respect of an alternative hypothetical portfolio is that Quadrangle would have kept its funds and invested in US dollars, rather than converted them to Canadian currency at all.

674. The Plaintiffs criticize Carlucci's evidence on re-examination to the effect that he used Canadian dollars "since … it's a Canadian case, Canadian defendants. I just left it at Canadian dollars, the way I calculate damages on any Canadian case".[248]

675. I accept and agree with Carlucci's approach. I accept the fact that most of Quadrangle's investments were denominated in US currency. However, it does not automatically follow based on the evidence that the most reasonable alternative assumption is that Quadrangle would have kept its funds invested in US rather than Canadian dollars.

676. Quadrangle was clearly prepared to make an investment in a Canadian asset, denominated in Canadian funds - that is exactly what it did in this case. In my view, it is therefore reasonable to assume that, just as in fact occurred, Quadrangle was content to invest in foreign currencies (or at least Canadian dollars) as part of its core investment strategy.

677. Moreover, I accept the submission of the Defendant that it is unreasonable to conclude that damages such as may flow from a fluctuating foreign currency exchange were reasonably foreseeable by the Defendant.

678. The cumulative effect of the above points on the analysis is that using Soriano's analysis (yielding but-for proceeds of USD $690,263,000, but applying the three adjustments proposed by Carlucci, the but-for proceeds in Scenario One, as adjusted, total USD $411,352,000 for Quadrangle.[249]

679. In my view, Quadrangle is entitled to an award of Canadian dollars sufficient to purchase that amount of USD[250], from which must be deducted the amount Quadrangle actually recovered following the 2015 sale of Mobilicity, and to which must be added pre-judgment interest.

680. If I am in error in this analysis, as noted above Quadrangle is entitled at a minimum of CAD $311,598,000, being the sum of the amounts conceded by the

[248] Re-Examination of Enzo Carlucci, December 22, 2023, Transcript, at p. 3907.
[249] Replacement - KPMG Expert Report (Quadrangle), at 2.12.
[250] See s. 121 of the *Courts of Justice Act.*

Defendants as having been invested by Quadrangle in Mobilicity ($216,698,000 to acquire the spectrum licences plus $94,900,000 in subsequent funding to capitalize Mobilicity), less amounts recovered following the 2015 sale, plus pre-judgment interest.

681. With respect to Scenario One damages for Obelysk, Soriano approaches the analysis in the same manner as he did for Quadrangle's damages: absent the negligent/negligent misrepresentation, Obelysk would not have invested in Mobilicity and would have instead invested in an alternative investment opportunity.

682. On this basis, Soriano calculates the loss for Obelysk as falling in a range between CAD $297,770,000 (assuming the Obelysk average holding period) or CAD $99,452,000 (assuming the actual Mobilicity holding period), and a low of CAD $62,457,000 based on the actual Mobilicity holding. Within that range, Soriano finds that the number would increase to CAD $127,680,000 using the Lumen Fund if the Obelysk average holding period were applied.[251]

683. Carlucci approaches his first criticism in respect of Obelysk consistent with the manner in which he approached the issue in respect of Quadrangle. He submits that Soriano's approach overestimates Obelysk's damages since it inherently compensates Obelysk for the operating losses (in addition to proceeds from an assumed rate of return on these operating losses) incurred by Mobilicity not related to the Defendant's negligence.

684. I reject this criticism in respect of damages for Obelysk for the same reasons that I rejected it above for Quadrangle. Obelysk is entitled to damages equal to its net return that it would have earned in an appropriate alternative investment portfolio: *Vipond*.

685. As a starting point, I repeat and accept the submission of the Defendant that "in the event that the Plaintiffs establish liability for negligent misrepresentation", damages should be limited to their "out-of-pocket loss" which is equivalent to "the Plaintiffs' initial investments in Mobilicity, totaling $250,000,010. As reflected in KSV's initial report, this sum is made up of $216,698,600 (Cdn) invested by Quadrangle and $33,301,410 (Cdn) invested by Obelysk."[252]

686. As with Quadrangle, in my view, Obelysk is entitled (as conceded by the Defendant) to at least the amount invested less the amount actually recovered, plus pre-judgment interest. It does not matter whether Obelysk had those funds in hand, or whether it borrowed a proportion of the funds to invest in the spectrum licence auction. The objective fact is that regardless of whether Obelysk raised the funds as equity or

[251] KSV Reply Expert Report – Plaintiff – Obelysk, at Schedule 1.
[252] Defendant's Closing Submissions, at para. 612.

debt or both, it raised the funds and used them to pay the Government for the spectrum licences.

687. For the reasons set out above, Obelysk did not get what it paid for, and is entitled at a minimum to be put in the position it would have been in but for the unlawful conduct: i.e., it is entitled to the return of that amount.

688. Beyond that, and while, as noted above, in my view, Obelysk is entitled to damages equal to the net returns it would have earned in an alternative investment portfolio, the challenge here is that beyond the funds it invested for the spectrum licences, it lacked additional available capital with which to invest in any alternative investment portfolio.

689. The Plaintiffs put forward the Lumen Fund as a comparable alternative investment portfolio. However, two facts are relevant to a consideration of whether the Lumen Fund is a comparable proxy, notwithstanding Carlucci's agreement that his three criticisms of Soriano's alternative investment scenario analysis in respect of Quadrangle would not apply to Obelysk.

690. First, Bitove conceded in cross-examination that the Lumen Fund was in fact not created until 2016, well after the key events at issue in this action, and approximately eight years after the point in respect of which the Lumen Fund is put forward as "but-for" proxy for the investments in the Mobilicity spectrum licences. I accept the submission of the Government that it is entirely too speculative to use the Lumen Fund as a proxy, given that it did not exist for almost a decade after the relevant period of time.[253] There is no evidence that the Lumen Fund (or an equivalent) was under consideration in any meaningful way, or was in fact in progress in or around 2008.

691. Bitove acknowledged in his evidence that the funds invested in Mobilicity were themselves borrowed, and that in 2008 – 2009, he was experiencing liquidity issues .[254] This reinforces my view that, as the Government submits, it is entirely speculative to suggest that the Lumen Fund would have been established earlier than 2016. It follows that an imputed rate of return for the period 2008-2016 for the Obelysk alternative investment value scenario is also entirely speculative. Finally in this regard, it is also speculative if one were to consider an alternative investment portfolio for Obelysk over the same holding period as Quadrangle (again, since the Lumen Fund did not exist for that same period).

692. For all these reasons, I find that Obelysk is entitled to damages equal to the amount it originally invested in the spectrum licences, being CAD $33,301,410, less the

[253] Cross-Examination of John Bitove, November 30, 2023, Transcript, at pp. 484-486.
[254] Cross-Examination of John Bitove, November 30, 2023, Transcript, at pp. 486-486.

amounts recovered following the sale in 2015, which are not in dispute, plus pre-judgment interest.

Scenario Two: Damages Based on the 2014 Interference in the Mobilicity Sales Process

693. As stated above, if damages are awarded as a result of the 2006 - 2008 misrepresentations and the implementation of the *2013 Transfer Framework*, it would be duplicative in my view, to award additional damages as a result of the 2014 interference in the Mobilicity sales process.

694. In any event, however, no additional damages would flow for the simple yet fundamental reason, as submitted by the Defendant, that the effect of the interference by the Government in 2014 was to pressure TELUS into withdrawing its offer for Mobilicity with a value of $380 million. The analysis is that "but for" the 2014 interference of the Defendant, a different outcome would have been achieved. In this Scenario Two, that different outcome would have been the completion of the TELUS transaction with a value of $380 million.

695. Whether one uses as a benchmark the proposed May 2013 ($380 million) TELUS transaction or the April 2014 ($350 million plus $22 million working capital) TELUS transaction, and assumes that either would have been (and ought to have been) approved by Industry Canada, the result is the same given the actual subsequent sale for a higher value.

696. Since Mobilicity was in fact sold the following year in 2015 for a higher amount ($465 million), I agree with the submission of the Defendant that no damages were suffered as a result of the 2014 interference (other than an amount to reflect the time value of money (i.e., the sale proceeds were not realized for over a year)), but this is compensated for in the award of pre-judgment interest).

697. I have considered the submission of the Plaintiffs to the effect that Mobilicity may not have been sold in 2014 even if Industry Canada was prepared to approve the transfer request to an incumbent in 2014 (i.e., upon expiry of the original five-year moratorium), and that a sale may not have occurred until 2015 in any event, such that a 2015 valuation date should be used even in Scenario Two.

698. I am not persuaded that anything other than a 2014 valuation date should be used. In the circumstances, and based on the evidence, I find that it was not only more likely than not, but overwhelmingly likely that if the Plaintiffs could have completed a sale of Mobilicity in 2014 (i.e., a licence transfer request would have been approved), they would have done so.

699. I find that by 2014, Mobilicity was already an extremely challenging financial circumstances, and the Plaintiffs were looking for an exit strategy. Put simply, in my view, they would have sold as soon as they could have.

700. Mobilicity was clearly facing financial challenges by this time. The evidence (the highlights of which are summarized above), was to the effect that the *2013 Transfer Framework* completely impaired the ability of Mobilicity to sell to an Incumbent, the only realistic universe of potential purchasers. It follows that 2014, when the licences could have been transferred but for the *2013 Transfer Framework*, is the appropriate valuation date to apply.

701. In cross-examination on the issue of why he selected a valuation date of June 24, 2015 instead, Soriano's evidence was that he was instructed to do so. Asked whether he would agree that if there were no regulatory restrictions, Mobilicity would have been sold when the five-year moratorium amended on February 13, 2014, his answer was that:

> "I don't have a view on that because I don't have a full understanding of all of the evidence that been presented which I think would be relevant to that assessment. And I would also be uncomfortable because it's not something that requires my expertise, as a financial analyst to talk about when the sale would have actually happened. so for those two reasons, I don't have a view on it."[255]

702. While Soriano's answer is honest and candid, it reinforces my view that Carlucci's preferred valuation date (2014 rather than 2015) is the appropriate one.

703. A very significant part of the Plaintiffs' case is that they were deprived of the ability to sell the spectrum licences to an Incumbent upon the expiry of the five-year moratorium, as they had been originally promised. I am satisfied that if they could have, they would have sold the licences (i.e., Mobilicity) as soon as possible thereafter.

704. For all of these reasons, I am satisfied that for the purposes of Scenario Two, a 2014 valuation date is appropriate.

705. The only remaining issue, then, is whether the opportunity lost as at a 2014 valuation date was to complete the TELUS offer at a value of $380 million, or whether a different value should be used. That TELUS offer was the only offer received, and therefore is the only objective, contemporaneous evidence of value at this point in time. As noted above, given that Mobilicity was in fact sold the following year in 2015 for $465 million, the 2014 value is irrelevant unless it would be higher than that.

706. Unlike the situation 2015 (discussed below), there was no active bidding war in 2014. There were no competing offers between TELUS and Rogers. While it is possible

[255] Evidence of Soriano, Transcript, December 8, 2023, p. 1825.

to model a 2014 value based on the approaches of Lemay and Marsden as to the value of spectrum licences, and then model damages suffered by the Plaintiffs based on the approaches of Soriano and Carlucci, all of the analyses are still irrelevant unless and until they yield an enterprise value in excess of $465 million.

707. In my view, and given the only objective evidence of the $380 million TELUS offer at this point in time, I find it too speculative to conclude that, but for the 2014 negligent acts of the Defendant, the Plaintiffs would have in fact sold Mobilicity in 2014 for more than $380 million but indeed also for more than $465 million.

708. Accordingly, there are no additional damages payable as a result of the 2014 interference in Scenario Two.

Scenario Three: Damages Based on the 2015 Interference in the Mobilicity Bidding War

709. A similar yet not identical approach to damages as that set out above in respect of Scenario Two applies also with respect to Scenario Three: the 2015 interference.

710. If damages are awarded as a result of the 2006 - 2008 misrepresentations and the implementation of the *2013 Transfer Framework*, it would be inappropriate to award additional damages in respect of the 2015 interference, since, in the "but for" world, that would never have occurred.

711. However, if no such damages in respect of the earlier periods were awarded, it does not follow, as it did in Scenario Two, that no additional damages ought to be awarded, since the evidence was to the effect that at this point in time (2015), the bidding war that fact occurred would have continued.

712. Accordingly, the calculation of damages in Scenario Three therefore requires an analysis according to the same "but for" principles applicable in Scenario One in this Scenario, to quantify and estimate as accurately as possible of the value that would have been realized in the 2015 bidding war, but for the early termination caused by the Defendant.

713. The Plaintiffs claim damages based on the doctrine of loss of chance.

714. Loss of chance is recognized as a basis for an award of damages: *Folland v. Reardon* (2005), 74 O.R. (3d) 688 (C.A.). In *Trillium Motor World Ltd. v. General Motors of Canada Limited*, 2015 ONSC 3824 ("*Trillium*")[256] at para. 543, citing *Webb & Knapp (Canada) Ltd. v. Edmonton (City)* (1970), 11 D.L.R. (3d) 544 (S.C.C.), at p. 557; *Eastwalsh v. Homes Ltd. v. Anatal Developments Limited* (1993), 12 O.R. (3d) 675 (C.A.), at paras. 37-45; *Wong v. 407527 Ontario Ltd.* (1999), 179 D.L.R. (4th) 38 (C.A.), at paras. 26-35, MacEwen, J. awarded damages for loss of chance following the

[256] Appeal allowed on other grounds, 2017 ONCA 544.

two-stage analysis: causation and quantum – as set out by the court of Appeal in *Folland*.

715. In the first stage, the plaintiff must show that the actions of the defendant because the plaintiff to lose a "real and significant" chance to obtain the benefit. In the second stage, the quantum of that benefit lost is then assessed according to the probability of the plaintiff obtaining that chance: *Trillium*, at paras. 545-546.

716. There is some debate in the jurisprudence as to whether applicability of the loss of chance doctrine is restricted to claims based on breach of contract or on concurrent contract and tort claims, or whether it has broader applicability to tort claims where there is no claim based in contract.

717. A number of the decisions arise out of solicitors' negligence (i.e., *Trillium*). In that case, Cronk, J.A. writing for the Court of Appeal, observed that "the question whether an action for damages for a lost chance sounds in tort is unsettled under the current Canadian jurisprudence." Cronk, J.A. went on to observe that the doctrine of lost chance in contract law has been expressly recognized both in Canada and in England, but that the distinction is important because, in contract law, proof of damage is not part of the liability inquiry whereas in tort law, liability rests not only on proof of a breach of the applicable duty of care, but as well on a showing by the plaintiff that the defendant's conduct caused a loss.[257]

718. I accept and recognize the distinction, but I find that here, it is not of paramount importance since for the reasons noted above, I have already found that the conduct of the Defendant here in fact caused a loss to the Plaintiffs (to be clear, particularly with respect to Scenario Three: the interference of the Defendant artificially and improperly brought an early termination to the bidding war for Mobilicity).

719. Accordingly, it is not critical to determine whether the doctrine loss of chance formally applies here or not. The functional analysis that must be undertaken in any event is very similar. The Defendant acknowledges this, and submits that while the loss of chance doctrine "has commonly arisen in the context of breach of contract claims as well as solicitor, real estate and medical negligence claims, … it is nevertheless instructive and can be applied by way of analogy".[258]

720. I must determine the likelihood that a higher value for Mobilicity would have been achieved (i.e., that the 2015 bidding war would have continued and yielded of value higher than the ultimately successful Rogers bid for $465 million), and if I am so satisfied, I must determine what that value is. Finally, I must determine the quantum of damages that flows from that value (i.e., the value less the recovery actually achieved following the 2015 sale).

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[257] *Trillium Motor World Ltd. v. Cassels Brock & Blackwell LLP*, 2017 ONCA 544, at paras. 261 and 262.
[258] Defendant's Closing Submissions, para. 643.

721. The analysis necessarily depends on some hypothetical inputs, and requires the exercise of judgment, considering all the relevant facts of the matter, to arrive at a fair and reasonable estimate of damages.

722. I accept that there was an actual bidding war under way and it was continuing. I further accept, as (in fairness) did the Defendant's expert, Carlucci, that there was a clear and unequivocal loss suffered, given the evidence of the TELUS offer of June 22, 2015, for $547 million, as compared to the ultimately successful Rogers offer the next day, June 23, 2015, of only $465 million.

723. On this fact alone, a loss is clearly established, and it cannot be less than that yielded by a decrease in enterprise value of $82 million. I must consider, however, whether this is the end of the analysis or whether the loss should be quantified based on a different value.

724. In my view, in Scenario Three, the "but for" model contemplates that the bidding war would have continued. That was occurring in June 2015. Accordingly, that is the appropriate valuation date.

725. The next issue is whether it is more likely than not that the auction would have continued and yielded a value higher than the $465 million Rogers offer that was ultimately accepted. I find that it would have.

726. The evidence with respect to the bidding war for Mobilicity (i.e., the process generating the "lost chance") was clear as to a number of things:

a. the bidding war between TELUS and Rogers was ongoing and continuing, as was demonstrated in part by the number of consecutive bids by Rogers and TELUS for Mobilicity;[259]

b. both of those bidders clearly had the means to fund such bids (i.e., they were not speculative or conditional). The (unchallenged) evidence of Aziz was that both companies were "well-funded" and "aggressive and competitive", such that the bidding war was an "ideal situation for an auction to start";[260] and

c. it had significant momentum.

727. Aziz, the CRO directly involved in the bidding process, "absolutely" expected to receive additional bids, and the potential value that could be realized by Mobilicity's stakeholders was "rising quite significantly. We got to a number that started in the $500 million range. I saw that as a floor, not a ceiling";[261]

728. The Government was of the same view at the time, as Nicholson reported (in a written email communication) to Moore the fact that the bidding war between Rogers

[259] Examination-in-Chief of William Aziz, December 1, 2023, Transcript, at pp. 562-563, 580-581, and 599-601.
[260] Examination-in-Chief of William Aziz, December 1, 2023, Transcript, at p. 566.
[261] Examination-in-Chief of William Aziz, December 1, 2023, Transcript, at pp. 603-604.

and TELUS was "rapidly accelerating"[262] as is demonstrated not only by the number of consecutive bids, but by the fact that the quantum of each incremental increase was material, the bidding war was robust (even in the short period from June 1, 2015 to June 22, 2015, the bids increased in the aggregate by over $200 million), as follows:

a. Rogers (June 1) bidding against itself (June 15) generating a bidding increase of $100 million;

b. TELUS (June 14) bidding against itself (June 18) generating a bidding increase of $55 million;

c. Rogers and TELUS submitting competing bids the very same day (June 19), representing a bidding increase (Rogers) of $20 million over the immediately preceding TELUS bid, and that same day, TELUS submitting a bid representing a bidding increase over the immediately preceding Rogers bid of the same day by another $22 million;

d. TELUS then bidding against itself three days later (June 22), representing an increase over its own immediately preceding bid of an additional $75 million ($547 million as against $472 million);

e. the ultimately successful Rogers bid (June 23) of $465 million, representing an increase of an additional $15 million over its previous bid (June 19); and

f. the letter from Hill to the effect that, contrary to both the earlier representation that Industry Canada would give rulings on licence transfer requests immediately, the fact that it actually did so (repeatedly), up to 12 weeks might be required for a decision on any transfer request, brought, in the words of Aziz, an immediate halt to the bidding war and "stopped it in its tracks"; and "made it very difficult for us to move forward with anything but a Rogers transaction at this point"; and the evidence of Huber was that it "effectively terminated the process".[263]

729. As noted above, it is not disputed that Industry Canada approval was required for the completion of any transaction.

730. Based on the evidence, in my view, the Plaintiffs have clearly established that in Scenario Three, the bidding war for Mobilicity would have continued, and would have yielded an enterprise value higher than the $465 million successful Rogers bid and also higher than the $547 million TELUS bid.

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[262] Exhibit 62, Cross-Examination Brief Prepared for James Nicholson, Tab 15, "James Nicholson of IC Summarizes Strategies with respect to Rogers- WIND and Telus- Mobilicity Transactions" dated June 20, 2015; Exhibit 62, Cross-Examination Brief Prepared for James Nicholson, Tab 16, Email to Minister Moore Discussing Requirements Imposed Upon Carriers dated June 21, 2015.

[263] Examination-in-Chief of Michael Huber, December 5, 2023, Transcript, at p. 1178.

731. I am reinforced in this conclusion that there was a loss by the evidence of the Defendant's expert, Marsden, to the effect that Mobilicity could have realized a materially higher price for its licences in an unrestricted process than it in fact obtained from Rogers.[264] Marsden himself estimates the enterprise value at $606,014,000:

But-For Enterprise Value of DAVE Holdings			
Asset / (Liability)		**Enterprise Value**	**% of Total Enterprise Value**
Spectrum Licenses	[1]	$ 455,000,000	75.1%
Property, plant and equipment	[2]	11,000,000	1.8%
Net working capital deficit	[2]	(26,027,679)	-4.3%
Other liabilities	[2]	(8,000,000)	-1.3%
Tax loss carry forwards	[2]	174,042,000	28.7%
Total Enterprise Value (rounded)		**$ 606,014,000**	**100.0%**

732. That enterprise value, even without more, is almost $150 million more than the price that Rogers actually paid for Mobilicity.

733. I pause to observe that the tax loss carry forwards reflected in the chart above were agreed. That reinforces the conclusion that the value of the spectrum licences drives almost exclusively the enterprise value.

734. All this evidence satisfies me that the Plaintiffs:

a. had a chance to obtain a higher value for Mobilicity;

b. this chance was sufficiently real and significant so as to rise above mere speculation;

c. the outcome (of the bidding war - i.e., the "chance" that the Plaintiffs would have obtained a higher price), depended on one or more third parties (i.e., Rogers and TELUS) and not just the Plaintiffs themselves; and

d. this lost chance had "some practical value": See *Trillium*, at para. 548 and *Folland*, at para. 73.

735. I must then determine the quantum of that lost chance or opportunity. In *Trillium*, the Court described this task as determining the value of what was likely lost and the likelihood of that value having been captured but for the misconduct: *Trillium*, at para. 586.

736. The Plaintiffs submit that this case is different because the value and the likelihood of achieving it are not inextricably linked, but rather can and should be determined independently.

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[264] Exhibit 66, Brief of Documents Prepared for Enzo Carlucci (Vol. 1), Tab 2, KPMG Quadrangle Expert Report, Schedule 3C.

737. Whether or not the two components are inextricably linked, each must be determined:

a. the potential value of Mobilicity's licences; and

b. the likelihood that Mobilicity could have realized that value.

738. As to the value, and as noted above, and further as conceded by the Defendant's expert Carlucci, this loss of chance had a value of at least $82 million (the difference between the successful Rogers offer of $465 million and the frustrated TELUS offer of $547 million).

739. I also accept the submission of the Plaintiffs that it must be higher (i.e. almost $150 million), given the calculation of the Defendant's expert Marsden of a total enterprise value of Mobilicity of $606 million as at this time (see chart above), and the fact that this enterprise value exceeded the amount that Rogers actually paid for Mobilicity of $465 million.[265]

740. The issue is whether it is any higher, and if so by how much. The experts called on behalf of the Plaintiffs and the Defendant respectively with respect to spectrum value (Lemay and Marsden) were in agreement that AWS-3 spectrum was a valid, comparable proxy for the AWS-1 spectrum that is the subject of this action.

741. Moreover, both agreed that the auction used as a proxy here - the AWS-3 auction held in March 2015 - revealed the maximum willingness to pay of bidders. I accept the submission of the Plaintiffs that the Court therefore has direct evidence of the highest potential value for the spectrum licences of Mobilicity, from the very same two parties who were subsequently bidding for Mobilicity two months later in May, 2015.[266]

742. Using the AWS-3 auction bids of the incumbents, and then transposing the bids of the incumbents for Tier 2 licences (the geographic basis for the AWS-3 auction), Lemay calculates that the equivalent bids for Mobilicity's spectrum licences total $1.39 billion in value.

743. Marsden did not conduct an equivalent analysis and conceded he did not attempt to model the highest price that Mobilicity could have for its spectrum. Instead, he calculated the amount Mobilicity would realize for its licences if it had sold them as part of the AWS-3 auction (i.e., a hypothetical re-run of the AWS-3 auction, using a second price approach, a VCG pricing mechanism and applying certain additional assumptions).

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[265] Exhibit 66, Brief of Documents Prepared for Enzo Carlucci (Vol. 1), Tab 2, KPMG Quadrangle Expert Report, Schedule 3C.

[266] Exhibit 31, First Report of LYA, dated December 5, 2022, at para. 13; Exhibit 65, Brief of Documents Prepared for Richard Marsden (Expert Witness) (Vol. 1), at p. 32; Exhibit 32, Reply Report of LYA to the First NERA Report, dated August, 2023, at para. 10; Cross-Examination of Richard Marsden, January 10, 2024, Transcript, at p. 4167.

744. Marsden assumed first that the value of Mobilicity's licences was decreasing, based in part on the fact that when TELUS bid for spectrum licences for Southern Ontario as part of the AWS-3 auction, its bid for a second block was lower by 57% than its bid for the first block. Marsden assumes similar decreases in value for the blocks in all regions.

745. In my view, some adjustment must be made to the hypothetical auction to take into account the additional supply of spectrum. Marsden's analysis accounts for the addition of Mobilicity's spectrum to the spectrum available in the AWS-3 auction, which is reasonable. So too is the assumption that values would generally decline as supply increased, particularly in circumstances where, as here, Bell did not participate in the pursuit of Mobilicity by making any offer. Finally in this regard, the evidence of Hill discussed above to the effect that by this point in time, the spectrum landscape had changed and there was significantly more capacity available, such that the concerns of Industry Canada about concentration were virtually eliminated, also supports the conclusion that some adjustment is appropriate.

746. Second, Marsden assumes that Bell would not have been interested in acquiring Mobilicity's licences, as a result of which assumption Marsden applies a discount of 10%, to reduce the value of the licenses in his hypothetical auction from $505 million to $455 million.

747. Among other things, the Plaintiffs rejected the basis for the 10% discount applied, being that Bell (as the third Incumbent) would not have been interested in an acquisition of Mobilicity's licences. Marsden did admit on cross-examination that he had no knowledge of why Bell did not pursue Mobilicity in June 2015 (and participate as a third player in the bidding war).

748. Aside from the fact that the evidence was to the effect that there was a Bell-TELUS network sharing agreement, and leaving aside for the moment whether that was a reason for Bell's non-participation or the reason why Bell would not be interested in bidding against TELUS for Mobilicity's spectrum (an assumption the Plaintiffs reject), the objective fact is that Bell did not participate in bidding war.

749. Was the absence of Bell a function of the sharing agreements with TELUS? Was it the result (as submitted by the Plaintiffs) of the repeated warnings and threats from the Government that it would not allow the incumbents to acquire set-aside spectrum? There is no sufficient evidence in the record for me to determine one way or the other.

750. I cannot speculate as to its reasons why Bell did not participate in the bidding war, because there was no evidence from Bell on this point, or at all. Accordingly, the Court is left only with the objective fact that Bell did not bid for the licences, notwithstanding that it was one of the three Incumbents originally excluded from bidding on the set-aside spectrum licences at the time of the auction in 2008, and notwithstanding that it is and was at the relevant time a major telecom player actively

competing head-to-head with the other incumbents (and had certain sharing agreements with TELUS).

751. However, even in a second price auction with only Rogers and TELUS competing (without the participation of Bell), Marsden concludes that Mobilicity would likely have been able to realize at least $455 million for its spectrum licences (see chart above). On Marsden's own analysis, this yields an enterprise value of just over $606 million.

752. Whatever the reason, the evidence was clear that in June 2015, there were only two bidders for Mobilicity: Rogers and TELUS. The objective fact is that the third incumbent, Bell, did not participate in the bidding war.

753. Accordingly, in my view, some adjustment is appropriate to reflect this reality. While the 10% threshold is an estimate, in my view, it is a reasonable one.

754. Marsden further assumes that Incumbents would not ascribe any premium to the value of AWS-1 spectrum over AWS-3 spectrum. The Plaintiffs reject the validity of this assumption for a number of reasons, including that AWS-1 spectrum could be immediately deployed on their networks to meet the demand, which was growing, for data and LTE service. I am not satisfied that Incumbents would have paid a premium, let alone such a significant one, for AWS-1 spectrum.

755. Considering all of these factors, the remaining issue is the extent to which the value ascribed to the spectrum licences by Lemay could have been realized in an unrestricted sales process. Lemay rejects Marsden's fair market value of the Mobilicity spectrum licences in June 2015 of approximately $455 million and estimates the value for the licences as at the same date as being approximately $1.392 billion.

756. In this regard, the Plaintiffs rely on the evidence of Ross. He is an experienced investment banker, whose evidence was unchallenged. He was forthright and explained in objective terms investment banking best practices in the nature and effect of different sales processes and auctions designed and run to maximize value. Ross rejected the use by Marsden of a second-price valuation as being inconsistent with standard investment banking practices and therefore not reflective of the value Mobilicity could expect to have received for its spectrum licences.

757. The second-price approach, or a second-price auction, is one where, as described by Ross, the highest bidder is the successful bidder and wins the auction, but pays the price bid by the second-highest bidder (perhaps with an incremental premium), rather than the price reflected in its own (highest) bid.

758. The idea is that such an auction can more accurately reflect the fair market value of the asset or business being auctioned, since it eliminates any artificial inflation reflected in the successful bid. That inflation arises from the fact that, in a traditional closed auction where bidders do not know the value of competing bids, the winning bidder does not know the value of the second-place bid, and therefore does not know

whether its own bid exceeds that bid by the slimmest of margins or an exaggerated amount.[267]

759. Ross was candid and forthright in his admission that he had no experience in spectrum licencing, management, or valuation specifically. Rather, his evidence focused on investment banking practices and how businesses were sold across North America, generally with a view to maximizing enterprise value. It was his opinion that while there may be policy reasons for a party such as the Government to conduct a second-price auction, a traditional mergers and acquisitions sales process reflects no such concerns and does not utilize such an approach since it will not maximize value for the seller.

760. The evidence of Ross was to the effect that the sale process for Mobilicity was conducted in a manner consistent with investment banking best practices and that, as intended, the company was attempting to maximize value and in doing so was utilizing the kind of process likely to be successful in realizing bidders' full value, or an amount close to it. I accept that evidence.

761. Even applying that approach, however, I am unable to conclude that the value of the spectrum licences in June 2015 was in the order of $1.392 billion as suggested by Lemay. Such a value exceeds not only the ultimate price at which Mobilicity was sold ($465 million), but indeed it exceeds the value of the highest bid received ($547 million) by more than double.

762. Put differently, to accept such a value would mean that all of the bids that were actually made as part of the robust and highly competitive bidding war in June, 2015, involving two of the three Incumbents - the most sophisticated and well-funded participants in this industry – were going back-and-forth in a universe that represented less than half of the value of the licences. I am unable to conclude, having considered all of the evidence, that this is realistic.

763. In my view, the appropriate value is closer to that suggested by Marsden (although it has to be somewhat higher). His valuation of $455 million as at June 2015 was consistent with the observed international trends reflected in the increase in spectrum values at the material time (i.e., the increase in his spectrum valuation from February/March 2014 to June 2015 from $333 million to $455 million is consistent with the increase of approximately 37% reflected in the international trends with respect to AWS spectrum).[268] The increase in value in Lemay's analysis for the same period, by contrast, is approximately 233%, a rate of increase not seen anywhere in the world.[269]

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[267] The third main type of auction is an open, ascending auction (sometimes referred to as an "English auction") in which all bidders know the identity of all other bidders and the quantum of each bid. This type of auction also generates a second-price result since, although the winning bidder pays the price it bid, it knew the value of the second-place bid and therefore to be successful had only to exceed that second-place bid by a small increment.
[268] Exhibit 64, Slide 40 (pg. G10690).
[269] Exhibit 64, Slide 40 (pg. G10690).

764. It follows that considering all of the evidence concerning the 2015 bidding war, I see no basis for such a significant increase in the estimate of value.

765. Having considered all of this evidence and all of these factors, the following conclusions flow:

a. the bidding war in 2015 was robust and, but for the actions of the Defendant, was continuing;

b. it was continuing, however, with only two of the three Incumbents participating;

c. Mobilicity had not performed financially as well as had been projected, had incurred operating losses, and I have considered this factor;

d. without doubt, the bidding war would have yielded a value for Mobilicity materially in excess of the $465 million actually paid by Rogers. This is clear from the fact of the TELUS offer for $547 million and Marsden's own conclusion that even applying his 10% discount and other assumptions, the value would be $606 million;

e. in my view, it is reasonable to conclude that the bidding war in 2015 would have yielded an enterprise value of Mobilicity of $650 million.

766. Accordingly, damages in Scenario Three should be assessed using an enterprise value of $650 million, from which amount appropriate deductions should be made to calculate the net recovery for each of Quadrangle and Obelysk, and from which further deductions must be made for the amounts actually recovered. There is no dispute that when Mobilicity was sold to Rogers for $465 million, Quadrangle received approximately $42.4 million, and Obelysk received $1.25 million[270].

767. I recognize that my conclusions above with respect to damages in the different Scenarios will likely require some arithmetic additions and subtractions to be made, to arrive at final net amounts payable, inclusive of pre-judgment interest. However, those calculations can be made based on the application of the above findings.[271]

RESULT AND DISPOSITION

768. The action is allowed. The Defendant is liable to the Plaintiffs in negligence and negligent misrepresentation. Judgment to go for the Plaintiffs in accordance with these reasons. They are entitled to an award of damages calculated in accordance with Scenario One described above (an amount reflecting a reasonable rate of return in an alternative investment scenario had the Plaintiffs not invested in the spectrum licences

[270] See, for example, Exhibit 67, slide 40 (pg. G12627) confirming proceeds received by Obelysk.

[271] For example, the calculation of pre-judgment interest for Quadrangle needs to reflect the fact that the funds advanced by way of debt were advanced in tranches at different points in time: section 130 of the *Courts of Justice Act.*

as part of the 2008 AWS Spectrum Auction and the subsequent buildout of Mobilicity, less amounts actually recovered).

769. The Parties are urged to agree on the issue of costs. If they are unable to do so, the Plaintiffs may file Submissions on Costs not to exceed ten pages in length, together with their Outline of Costs, by filing same with my judicial assistant within 45 days of the date of these Reasons. The Defendant shall have 45 days thereafter to file Responding Submissions on Costs, also not to exceed five pages in length. Given the complexity of this matter, if necessary the Plaintiffs may file Reply Submissions on Costs within 15 days thereafter, not to exceed five pages in length.

770. Finally, this was a lengthy and complex trial. I am grateful to counsel for all parties for their professionalism, civility and assistance to the Court with respect to this matter. All parties were well represented by their counsel.