Federal Court  Cour fédérale

Date: 20141202

Docket: T-1295-13

Citation: 2014 FC 1157

Ottawa, Ontario, December 2, 2014

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

TELUS COMMUNICATIONS COMPANY

Applicant

and

ATTORNEY GENERAL OF CANADA, BELL MOBILITY INC., BRAGG COMMUNICATIONS INC. CARRYING ON BUSINESS AS EASTLINK, DATA & AUDIO-VISUAL ENTERPRISES WIRELESS INC. CARRYING ON BUSINESS AS MOBILICITY, GLOBALIVE WIRELESS MANAGEMENT CORP. CARRYING ON BUSINESS AS WIND, MTD INC., ALLSTREAM INC., PUBLIC MOBILE INC., ROGERS COMMUNICATIONS INC., SASKATCHEWAN TELECOMMUNICATIONS AND SHAW COMMUNICATIONS INC.

Respondents

JUDGMENT AND REASONS

[1] The Applicant, Telus Communications Company, is seeking declaratory and other relief in respect of the adoption by the Minister of Industry of a Deemed Transfer Requirement as a

matter that would require Ministerial approval before a transfer of certain spectrum licences could take effect. For the reasons that follow, I have determined that the application will be dismissed and no such declaratory relief will be given.

I. BACKGROUND

[2] Long-distance wireless telecommunication in Canada is governed by federal statutes, including the *Telecommunications Act*, SC 1993, c 38, and the *Radiocommunication Act*, RS 1985, c R-2 and the regulations under it, the *Radiocommunication Regulations*, SOR/96-484. The *Telecommunications Act* has an unusual history. It can be traced back to the *The Railway Act*, 1903, 3 Edw. VII, c 58, although it has undergone several revisions, consolidations and new enactments since that time.

[3] Wireless telecommunication is enabled by electronic devices which make use of the electromagnetic spectrum. This spectrum encompasses a broad range of radio frequencies, which are treated as a public resource owned and administered by the federal government. The government determines what frequencies may be used by what persons and for what purposes. Certain portions of the frequency spectrum may become available for commercial use, such as by those offering cell phone services, and have been sold by auction conducted by the federal government. The policies relevant to the auction and the issues here came into being in the latter part of 2007, when the federal government publicly announced the licensing framework for the issuance of spectrum licences in the Advanced Wireless Services (AWS) band. Based on the policies, the Minister held an action for said issuance of spectrum licences in the AWS band in May to July of 2008 and several parties were successful in acquiring AWS spectrum licences.

Among them were Bell, Rogers, Telus, and smaller "new entrants". Shaw also participated in the auction and was a new entrant at the time.

[4] The Applicant Telus was successful in acquiring licences in 58 service areas for which it paid a total of almost 880 million dollars.

[5] Eight different blocks of spectrum, identified as Blocks A to H, were made available for auction; three of which Blocks B, C and D were "set aside" for bidding exclusively by those identified as "new entrants". A new entrant was identified as an entity, - including affiliates and associated entities - which holds less than ten (10) percent of the national wireless market in Canada based on revenue. Telus was not a new entrant, therefore, could not bid on the "set aside" blocks of spectrum.

[6] Telus submits that when it bid on the spectrum made available, it was less aggressive than it might have been, since the Minister made representations (sometimes referred to as the five-year moratorium representations) that led Telus to believe that, after five years, there would be a possibility that it could pursue arrangements with one or more of the smaller entities to acquire some or all of their spectrum. The representations, as set out in various AWS "framework" documents published by the Minister said, in effect:

> *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 5 years from the date of issuance.*

[7] Telus asserts that, in bidding on the original release of spectrum, it was content to acquire less than it calculated that it would need in the future, confident that, after five years, it could acquire spectrum from one or more of the new entrants. The evidence on this point is scanty, it is little more than a simple assertion made by their affiant, an executive Stephen Lewis, supported by a copy of some power point slides that he said he showed at an internal meeting within the Telus organization.

[8] Telus and other wireless carriers, including the "new entrants" were issued licences by the Minister of Industry in respect of the spectrum that they were successful in acquiring in the bidding process. Telus' licence included the following term as to transferability and divisibility:

> *The licensee may apply in writing to transfer the licence in whole or in part…Departmental approval is required for each proposed transfer of a licence…*

[9] In March, 2013, Industry Canada consulted with "stakeholders" including Telus and others, in respect of a number of policy initiatives, including the concept of "deemed transfer". This concept captured a broader definition of transfers so as to include any immediate change of control of a licence or licensee, including a change made through an "Agreement" which was broadly defined. Among the stakeholders in support of such an initiative was Telus, a position Telus' Counsel described as foolish in hindsight.

[10] I will set out the deemed transfer provisions in greater detail subsequently.

[11] Telus comes to Court asking for declarations:

> *(a) that the Minister is estopped from implementing the LTP Framework insofar as it purports to impose a condition in AWS licences requiring that an application be made to the Minister for approval of "Deemed Transfers" or AWS licences, and from amending AWS licences to include such a condition;*
>
> *(b) that the Minister did not have jurisdiction to adopt the LTP Framework insofar as it purports to require that an application be made to the Minister for approval of "Deemed Transfers" of AWS and other spectrum licences;*
>
> *(i) quashing the LTP Framework insofar as it purports to impose a condition in AWS and other spectrum licences requiring that an application be made to the Minister for approval of "Deemed Transfers" of such licences;*
>
> *(ii) prohibiting the Minister from implementing the LTP Framework insofar as it purports to impose a condition in AWS licences and other spectrum licences requiring that an application be made to the Minister for approval of "Deemed Transfers" of such licences, and from amending AWS and other spectrum licences to include such a condition; and*

[12] The Attorney General opposed the application. Only two of the other named Respondents filed a written memorandum – they were Rogers Communications Inc. and Shaw Communications Inc. They both were represented by Counsel, who made submissions, at the hearing before me. Shaw took no substantive position and asked that any decision be confined to the specific facts of this case. Rogers took the position that if it was necessary to render a decision on the estoppel issue, the mere requirement to seek approval for a Deemed Transfer does not qualify as a detriment for estoppel purposes.

[13] By letter dated November 17, 2014, and as affirmed at the hearing, Counsel for Telus advised that it would not be arguing the jurisdictional point raised at paragraphs 43 through 48 of

its written memorandum, namely, that the Deemed Transfer Requirement trespasses on the powers assigned to the Governor in Council under the *Radiocommunication Act* in relation to spectrum management and is therefore beyond the Minister's jurisdiction to enact.

II. THE ISSUES

[14] The issues that remain for determination are:

1. What is the standard of review?

2. Does the Deemed Transfer Requirement trespass on the powers assigned to the Commissioner of Competition and the Competition Tribunal under the *Competition Act*, RSC, 1985, c C-34 in relation to merger control, and therefore beyond the Minister's jurisdiction to act?

3. Do sections 4(1) of the *Department of Industry Act*, SC 1995, c 1, 5(1) and (1.1) of the *Radiocommunication Act* and 7 of the *Telecommunications Act* confer authority on the Minister to enact the Deemed Transfer Requirement?

4. If the Minister has jurisdiction to enact the Deemed Transfer Requirement, is the Minister estopped from doing so, at least as far as Telus is concerned, because of representations made and relied upon by Telus?

[15] I will first set out in detail some of the relevant pronouncements and documents.

III. POLICY AND LICENCES

[16] In a document entitled "Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range", dated November 2007, published by Industry Canada, it was stated, *inter alia*, at page 1:

> *This paper provides policy decisions on the key elements of the policy framework for the auction for spectrum licences in the 2 GHz range including Advanced Wireless Services (AWS).*
>
> . . .
>
> *The policy decisions contained in this paper are final.*

and at pages 4, 5, and 6:

> *The current spectrum licensing regime recognizes the complementary nature and the division of responsibilities among Industry Canada, the CRTC and the Competition Bureau. These policy decisions are without prejudice or inference as to any existing CRTC tariffs, proceedings, future determinations or findings by the CRTC or the Competition Bureau.*
>
> ***Spectrum Set-aside***
>
> *Forty MHz of AWS spectrum will be set aside for new entrants only in frequency blocks B, C and D (see Figure 1).*
>
> *The amount of set-aside spectrum takes into account the need for new entry in all regions of Canada while considering the interests of incumbent operators and their current spectrum holdings.*
>
> *Consideration was given to the use of a spectrum aggregation limit, also referred to as a spectrum cap. Given the amount of spectrum being auctioned and the varying spectrum needs expressed by respondents, a spectrum set-aside is considered the most appropriate approach as it provides the greatest flexibility to auction participants in determining their needs.*

> *To be eligible for the set-aside, a new entrant is defined as:*
>
> > *An entity, including affiliates and associated entities, which holds less than 10 percent of the national wireless market based on revenue.*
> >
> > . . .
>
> *Should an entity qualify as a new entrant at the time of licensing, this designation would remain valid throughout the term of its licence even if the entity is successful in growing its market share beyond 10 percent of the national market share based on revenue.*
>
> *While all licence transfers must be approved by the Minister, 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 5 years from the date of issuance.*

[17] This last paragraph, sometimes referred to in argument as the 5-year moratorium representations, was repeated three times in different statements issued by the Minister.

[18] The licence issued to Telus as a result of the 2008 AWS auction included the following terms:

> *1. Licence Term*
>
> *The 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 licensee 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 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.*
>
> *The Department may define a minimum bandwidth and/or geographic dimension (such as the grid cell) for the proposed transfer. Systems involved in such a transfer shall conform to the technical requirements set forth in the applicable standard.*
>
> *Licences acquired through the set-aside of spectrum (as defined in Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range) may not be transferred or leased to , acquired by means of a change in ownership or control of the licensee, divided among, or exchanged with companies that do not meet the criteria of a new entrant, for a period of 5 years from the date of issuance. Industry Canada will consider requests from licensees, whether new entrants or incumbents, to exchange spectrum blocks on the same geographic territory, provided that the amount of non-set-aside spectrum is equal to or greater than the set-aside spectrum and the Department may grant such requests based on the merits of the proposal and conformity with the policy objectives.*
>
> *The licensee may apply to use a subordinate licensing process.*

[19] In June, 2013, Industry Canada published a document entitled "Framework Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences for Commercial Mobile Spectrum". The "Intent" and "Policy Objectives" of the document was set out as follows on pages 1 and 2:

> *1.1* ***Intent***
>
> *1. Through the release of this Framework, Industry Canada hereby announces the decisions resulting from the consultation process undertaken in Canada Gazette notice DGSO-002-13, Consultation on Considerations Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences.*
>
> *2. All comments and reply comments received in response to the consultation documents are available on Industry Canada's website at: http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/h_sf10568.html.*

> *3. This paper sets out changes to existing conditions of spectrum licences in bands for commercial mobile spectrum and to Industry Canada's publication, Licensing Procedure for Spectrum Licences for Terrestrial Services (CPC-2-1-13), hereinafter referred to as the Spectrum Licence Procedures. This document sets out the procedures related to requests involving the transfer, division or subordinate licensing of these spectrum licences.*
>
> *4. This Framework applies in addition to the existing provisions of the Spectrum Licence Procedures and will be integrated into them. All other provisions of the Spectrum Licence Procedures are unchanged and will continue to apply to spectrum licences issued both for commercial mobile spectrum and for all other services..*
>
> . . .
>
> *1.3* ***Policy Objectives***
>
> *7. Industry Canada has developed this Framework to support the Government's policy objective to maximize the economic and social benefits that Canadians derive from the use of the radio frequency spectrum resource, including the efficiency and competitiveness of the Canadian telecommunications industry, and the availability and quality of services to consumers.*
>
> *8. The intent of the Framework is to provide guidance to licensees as to how transfers of spectrum licences will be reviewed, as well as to introduce additional conditions of licence regarding the transfer of control of spectrum licences, all with an eye to managing the spectrum resource for the benefit of Canadians as per the policy objectives outlined above.*

[20] At page 6, it is stated that a number of "stakeholders" were consulted and that the proposed criteria and considerations were "generally supported" by Telus and others, and not supported by yet others:

> *2.3* ***Considerations and Criteria***
>
> *26. In the consultation, Industry Canada sought comments from stakeholders on the considerations and criteria concerning the review of requests for the transfer or division of licences, as well as the subordinate licensing of spectrum licences.*
>
> ***Summary of Comments***
>
> *27. The proposed criteria and considerations were generally supported by TELUS, MTS Allstream, Public Mobile, Eastlink and Xplornet. They were not supported by Bell Mobility, Rogers, Quebecor or Mobilicity.*

[21] At page 4, the scope of Application of the Framework was set out including, at paragraphs 15 and 16 that it would apply to existing licences and to future bands and services yet to come.

> *15. This Framework will apply to existing commercial mobile spectrum Licences. The provisions outlined in this Framework will be applied to Licence Transfers and Prospective Transfers, on or after the date of publication of this Framework.*
>
> *16. The Minister of Industry may, in the future, impose the terms of this Framework or specific conditions of licence retarding Licence Transfers and Prospective Transfers to Licences in frequency bands or services not discussed within this Framework.*

[22] At page-10, Industry Canada decided that it would treat what it called "Deemed Transfers" of a licence in the same way that it would treat any other transfer of a licence; namely, that notice would have to be given to Industry Canada, who would review the proposed transfer and approve it, or not. A "Deemed Transfer" was defined at paragraph 58 on page 10:

> *58. Industry Canada will therefore adopt the following definition:*
>
> *Deemed Transfer: Any immediate change to the Control of a Licence or Control of a Licensee or Affiliate that can be effected*

> *without making a Transfer Request, including a change made through the granting of any full or partial right or interest in a Licence through an Agreement.*

[23] This definition was further expanded upon at paragraphs 56 and 57 at page 10:

> *56. The inclusion of Deemed Transfers in the definition of a Licence Transfer is meant to capture a variety of situations where there is a change in the Control of a Licence or Control of a Licensee or Affiliate, such as:*
>
> *(a) a transfer of shares of the Licensee or its Affiliates, including the purchase of shares, or effecting the conversion of shares;*
>
> *(b) strategic alliances and joint ventures;*
>
> *(c) an Agreement providing for exclusive use or excluding others from using licensed spectrum; or*
>
> *(d) any Agreement that provides for "negative control," i.e. an Agreement preventing a licensee from entering into an Agreement with a competitor to transfer a Licence.*
>
> *57. Industry Canada considers that certain types of influence can lead to a person having Control of a Licensee or Affiliate or Control of a Licence. These can include, among others, influence over the board of directors and/or operations of the Licensee and influence based on economic dependence of the Licensee.*

[24] The rationale is discussed at pages 9 and 10, including at paragraphs 46, 47 and 54:

> *2.4* ***Deemed Transfers***
>
> *46. Deemed Transfers have the effect of changing the control of a spectrum licence, either through a change in the ownership or the control or a licensee or through other means that would cause a person other than the licensee to control the spectrum licence.*
>
> *47. In the consultation paper, Industry Canada proposed to treat any deemed spectrum licence transfer in the same fashion as other licence transfers. Given that the current conditions of licence require that Industry Canada approve all spectrum licence transfers, it was proposed that licensees would be required to*

> *notify Industry Canada prior to finalizing a deemed spectrum licence transfer. Such notifications would be treated as a spectrum licence transfer request to be reviewed by Industry Canada, as set out elsewhere in the consultation.*
>
> . . .
>
> *54. The treatment of Deemed Transfers as Licence Transfers is important in order to ensure that all changes to the control of spectrum licences are reviewed in a consistent manner.*

[25] The manner in which Industry Canada will normally take into account its determination as to licence transfers is set out at paragraphs 39 and 40 at page 8 of the Framework:

> *39. In making its determination as to the impact of a Licence Transfer on the policy objectives of this Framework, Industry Canada will analyze, among other factors, the change in spectrum concentration levels (i.e. the amount of spectrum controlled by the Applicants in comparison to that held by all licensees) that would result from the Licence Transfer. In each case, Industry Canada will 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).*
>
> *40. As part of the determination described above, Industry Canada will normally take into account the following factors:*
>
> *(a) the current licence holdings of the Applicants and their Affiliates in the licensed area;*
>
> *(b) the overall distribution of licence holdings in the licensed spectrum band and commercial mobile spectrum bands in the licensed area;*
>
> *(c) the current and/or prospective services to be provided and the technologies available using the licensed spectrum band;*
>
> *(d) the availability of alternative spectrum that has similar properties to the licensed spectrum band;*
>
> *(e) the relative utility (e.g. above and below 1 GHz) and substitutability of the licensed spectrum and other commercial mobile spectrum bands in the licensed area;*

> *(f) the degree to which the Applicants and their Affiliates have deployed networks and the capacity of those networks;*
>
> *(g) the characteristics of the region, including urban/rural status, population levels and density, or other factors that impact spectrum capacity or congestion; and*
>
> *(h) any other factors relevant to the policy objectives outlined in this Framework that may arise from the Licence Transfer.*

[26] On July 15, 2013, Industry Canada amended the above-referenced AWS licence issued to Telus by adding Appendices. Paragraph 2 stated, *inter alia*:

> *2. Licence Transferability and Divisibility*
>
> *This licence is transferable in whole or in part (divisibility), in both bandwidth and geographic dimensions, subject to Industry Canada's approval. A Subordinate Licence may also be issued in regard to this licence, subject to Industry Canada's approval.*
>
> *Licences acquired through the set-aside of spectrum (as defined in the Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range) may not be transferred or leased to, acquired by means of a change in the Control of the Licensee or Affiliate or in the Control of a Licence (other than by way of a transfer or lease) by, divided among, or exchanges with companies that do not meet the criteria of a new entrant, for a period of 5 years from the original date of Issuance. Industry Canada will consider requests from licensees, whether new entrants or incumbents, to exchange spectrum blocks in the same geographic territory, provided that the amount of non-set-aside spectrum is equal to or greater than the set-aside spectrum and Industry Canada may grant such requests based on the merits of the proposal and conformity with the policy objectives.*
>
> . . .
>
> *The licensee must apply in writing to Industry Canada for approval prior to implementing any Deemed Transfer, which will be treated as set out in CPC 2-23. The implementation of a Deemed Transfer without the prior approval of Industry Canada will e considered a breach of this condition of licence.*

IV. STANDARD OF REVIEW

[27] In conducting a judicial review it is usual that the Court first establish the standard of review to be applied either reasonableness or correctness. Sometimes the parties agree as to which standard of review applies, in which case the Court will usually follow that agreement. Where the parties do not agree, but the Courts have established what standard is to be applied in the same or similar circumstances, the Supreme Court of Canada has instructed that the Court should follow what has been established (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at paras 51 to 64; *Agraira v Canada (Public Safety and Emergency Preparedness)*, [2013] 2 SCR 559 at para 48).

[28] Strickland J of this Court has recently considered the standard of review in respect of the Minister's determination of jurisdiction in circumstances very like the present in *Telus Communications Co v Canada (Attorney General)*, 2014 FC 1 (no appeal taken). The circumstance that she was dealing with was set out at paragraph 49 of her Reasons:

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

[29] She made a thorough review of the statutory scheme the Minister operates under, the jurisprudence on standard of review, and concluded that the standard of review was correctness. She wrote at paragraphs 59 to 61:

> *59 In my view, and as acknowledged by the Applicant at the hearing of this matter, the present case is not a challenge to the wisdom or soundness of a government policy, but is a question of whether there is authority to enact decisions made under a policy. The Applicant has not challenged the reasonableness of the Minister's decision to impose conditions on spectrum licences in the 700 MHz band. While the interpretation of the Minister's home and closely related statutes is involved, the nature of the question posed to this Court is one of true jurisdiction in that a jurisdictional line between the authority of the Minister and the Governor-in-Council is at issue. Therefore, this is a question of statutory interpretation of the nature which attracts a correctness standard of review.*
>
> *60 Moreover, the RA does not contain a privative clause, the Minister did not act in an adjudicative capacity, and, while the Minister has expertise in telecommunications, this does not necessarily confer special legal expertise to interpret the relevant statutory provisions to delineate authority as between the Minister and the Governor-in-Council which is also a question that the Court is better able to answer in these circumstances.*
>
> *61 Accordingly, in my view, correctness is the appropriate standard of review on this application.*

[30] We are also dealing with a challenge to the Minister's jurisdiction to make the decision to create the Deemed Transfer Requirement, not the wisdom or reasonableness of the decision itself. Hence making a finding on the challenge requires determining the jurisdictional line between the Minister's authority under the *Department of Industry Act*, the *Radiocommunication Act* and the *Telecommunications Act* on the one hand and the Commissioner of Competition and the Competition Tribunal's authority under the *Competition Act* on the other. I therefore adopt Strickland J's standard of review analysis as it relates to the statutory scheme the Minister operates under, and in respect of the issues raised by Telus as to jurisdiction, I will proceed using the standard of correctness.

[31] With respect to the estoppel issue, Telus submits that a correctness standard applies, as this issue lies outside the expertise of the Minister (*Kumari v Canada (Minister of Citizenship and Immigration*, 2013 FC 1231 at para 26; *Pavicevic v Canada (Attorney General)*, 2013 FC 997 at para 29, 20 Imm LR (4th) 37; *Productions Tooncan (XIII) Inc v Canada (Minister of Canadian Heritage)*, 2011 FC 1520 at paras 40-41, 404 FTR 19). In its written submissions the Attorney General submitted that the matter should be considered *de novo*, as it requires an examination of the facts for the first time and the application of legal principles to those facts. However, at the hearing, the Attorney General consented to the Applicant's submission and referred to Manville JA's decision for the Federal Court of Appeal in *Malcolm v Canada (Minister of Fisheries and Oceans)*, 2014 FCA 130 at para 29, 460 NR 357 for the proposition that the law is settled on this point: the applicable standard of review to questions involving promissory estoppel is correctness. I agree and will therefore apply the correctness standard to the estoppel issue.

Does the Deemed Transfer Requirement Trespass on the Powers Assigned to the Commissioner of Competition and the Competition Tribunal Under the Competition Act in Relation to Merger Control and is Therefore Beyond the Minister's Jurisdiction to Enact?

[32] Telus raised, for the first time in its written memorandum (paragraphs 38 to 42), the argument that the Deemed Transfer Requirement trespasses on the powers assigned to the Commissioner of Competition and the Competition Tribunal in relation to merger control and is therefore beyond the Minister's jurisdiction to enact.

[33] Counsel for the Attorney General, at the hearing before me, moved to strike this argument on the basis that it had not been raised in Telus' Notice of Application. I pause to note

that at the outset of the hearing Telus moved, on consent, to amend its Notice of Application, but in respect of a minor matter having nothing to do with this point. On the main point, the Attorney General is correct in stating that the issue has not been raised by Telus in its Notice of Application.

[34] The Federal Court of Appeal in *Cyprus (Commerce and Industry) v International Cheese Council of Canada*, 2011 FCA 201, 420 NR 124 per Mainville JA at paragraph 15, held that before raising a ground not set forth in its Notice of Application, a party should have brought a timely motion to amend, failing which the Judge hearing the matter is not wrong in not hearing the issue:

> *15 In light of this subsection of the Act, I find that the Judge did not err in not allowing the appellant to raise the relevant date as a ground of appeal, especially given that authorizing the ground would have been prejudicial to the respondent. In order to raise this ground, the appellant would have had to file an appropriate motion to amend its notice of appeal, which would have allowed for a timely debate as to the relevance of such an amendment and, if necessary, the measures required to prevent either party from suffering prejudice.*

[35] Similarly, de Montigny J of this Court in *Vézina v Canada (National Defence Chief of the defence staff)*, 2012 FC 625, 411 FTR 303 at paragraphs 20 to 22 refused to consider an issue raised for the first time in a party's memorandum in a judicial review.

[36] Therefore, I will not permit Telus to make this argument before me. However, in the event that an appeal may be taken, I will provide my determination of this matter.

[37] The issue raised by Telus is one of alleged conflict between the provisions of the *Competition Act*, RSC 1985, c C-34, section 92(1), dealing with mergers, and the Deemed Transfer Requirement, which also deals with mergers in certain circumstances. The *Competition Act*, section 91 defines merger for the purpose of section 92, subsections 92(1)(a), 92(1)(e)(ii) and 92(1)(f)(i)-(ii) provide that the Competition Tribunal, an application of the Commissioner, may deal with certain types of merger:

91. In sections 92 to 100, "merger" means	*91. Pour l'application des articles 92 à 100,*
the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase	*« fusionnement » désigne l'acquisition ou l'établissement,*
or lease of shares or assets, by amalgamation or by combination or otherwise, of	*par une ou plusieurs personnes, directement*
control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person.	*ou indirectement, soit par achat ou location d'actions ou d'éléments d'actif, soit par fusion, association d'intérêts ou autrement, du contrôle sur la totalité ou quelque partie*
92. (1) Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially	*d'une entreprise d'un concurrent, d'un fournisseur,*
(a) in a trade, industry or profession,	*d'un client, ou d'une autre personne, ou encore d'un intérêt relativement important dans la totalité ou quelque partie d'une telle entreprise.*
...	*92. (1) Dans les cas où, à la suite d'une demande du commissaire, le Tribunal conclut qu'un fusionnement réalisé ou proposé empêche ou diminue sensiblement la concurrence, ou aura*
(e) in the case of a completed merger, order any party to the	

merger or any other person	*vraisemblablement cet effet :*
...	*a) dans un commerce, une industrie ou une profession;*
(ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or	...
...	*e) dans le cas d'un fusionnement réalisé, rendre une ordonnance enjoignant à toute personne, que celle-ci soit partie au fusionnement ou non :*
(f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person	*(ii) de se départir, selon les modalités qu'il indique, des éléments d'actif et des actions qu'il indique,*
(i) ordering the person against whom the order is directed not to proceed with the merger,	...
(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or	*f) dans le cas d'un fusionnement proposé, rendre, contre toute personne, que celle-ci soit partie au fusionnement proposé ou non, une ordonnance enjoignant :*
	(i) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder au fusionnement,
	(ii) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder à une partie du fusionnement,

[38] Telus argues that these provisions conflict with the Deemed Transfer Requirements established by the Minister.

[39] In his judgment for the majority, Cromwell J of the Supreme Court of Canada has provided guidance in such a situation in the recent decision of *Thibodeau v Air Canada*, 2014 SCC 67. He states that there is a difference between overlap and conflict. Where possible, interpretation should be given to avoid conflict. He wrote at paragraph 89:

> *89 Courts presume that legislation passed by Parliament does not contain contradictions or inconsistencies and only find that they exist when provisions are so inconsistent that they are incapable of standing together. Even where provisions overlap in the sense that they address aspects of the same subject, they are interpreted so as to avoid conflict wherever this is possible.*

[40] The type of conflict that would cause a Court to have to choose between one or another of the jurisdictions provided by statute or regulation are those which "operationally conflict", to use the words of L'Heureux-Dubé J in *British Columbia Telephone Co v Shaw Cable Systems (BC) Ltd* , [1995] 2 SCR 739 at paragraph 47:

> *47 It is important to underline, however, that Domtar dealt with a relatively minor type of conflict between administrative tribunals concerning the interpretation of a section of an Act. While the CALP and the Quebec Labour Court decisions at issue in Domtar employed inconsistent interpretations of s. 60 AIAOD, they did not directly conflict in result, in that it was possible to fully implement both decisions. Thus, this Court decided not to interfere with the decisions of the two tribunals. However, the situation is considerably different where the conflict between administrative tribunal decisions is more serious. The most serious type of conflict arises where administrative tribunals reach operationally irreconcilable decisions (hereinafter referred to as an "operational conflict"). This will occur where compliance with the decision of one tribunal necessitates violation of the other tribunal's decision. Such a result places a person in an intolerable situation. He or she has no choice but to ignore one of the operationally conflicting orders. In such circumstances, it is, in my view, the responsibility of the courts, exercising their inherent jurisdiction, to determine which of the two conflicting decisions should take precedence.*

[41] Similarly, Rothstein J of the Supreme Court of Canada in his majority judgment in *Reference re Broadcasting Regulatory Policy*, [2012] 3 SCR 489, spoke of conflict where there was an impossibility of compliance with both provisions at paragraphs 44 to 45:

> *44 For the purposes of the doctrine of paramountcy, this Court has recognized two types of conflict. Operational conflict arises when there is an impossibility of compliance with both provisions. The other type of conflict is incompatibility of purpose. In the latter type, there is no impossibility of dual compliance with the letter of both laws; rather, the conflict arises because applying one provision would frustrate the purpose intended by Parliament in another. See, e.g., British Columbia (Attorney General) v. Lafarge Canada Inc., 2007 SCC 23, [2007] 2 S.C.R. 86, at paras. 77 and 84.*
>
> *45 Cases applying the doctrine of federal paramountcy present some similarities in defining conflict as either operational conflict or conflict of purpose (Friends of the Oldman River Society, at p. 38). These definitions of legislative conflict are therefore helpful in interpreting two statutes emanating from the same legislature. The CRTC's powers to impose licensing conditions and make regulations should be understood as constrained by each type of conflict. Namely, in seeking to achieve its objects, the CRTC may not choose means that either operationally conflict with specific provisions of the Broadcasting Act, the Radiocommunication Act, the Telecommunications Act, or the Copyright Act; or which would be incompatible with the purposes of those Acts.*

[42] In the present circumstances, Telus demonstrated that there may be some overlap between the powers assigned to different federal tribunals, Competition Tribunal's regulation of mergers under the *Competition Act* and the Minister of Industry: the Minister now requires an application for Ministerial approval in the case of a prospective Deemed Transfer, acquiring control of a spectrum licence through a merger falls within the definition of a Deemed Transfer. Therefore, while the Minister's intention is to regulate spectrum licences and not mergers, the effect of his decision can have the consequence of regulating mergers within the meaning of the *Competition Act* depending on the circumstances of the case. However, Telus failed to

demonstrate any overlap that creates fundamental differences, or one that creates impossibility of compliance with one while complying with the other, or bring any evidence of an actual operational conflict between the Minister's decision to create the Deemed Transfer Requirement and a decision of the Competition Tribunal or the Commissioner of Competition.

[43] I therefore find that the jurisdiction given to the Commissioner of Competition and Competition Tribunal by the *Competition Act* does not oust the jurisdiction of the Minister of Industry to make the Deemed Transfer Requirements at issue here.

Does Sections 5(1)-(1.1) of the Radio Communication Act, Section 4(1)(k) of the Department of Industry Act and Section 7 of the Telecommunications Act confer on the Minister the Authority to Enact the Deemed Transfer Requirement?

[44] Telus argues that section 5 (1.1) of the *Radiocommunication Act*, RSC 1985, c R-2 provides that in enacting the powers conferred by subsection 5(1) of that *Act* the Minister may have regard to the objectives of the Canadian telecommunication policy as set out in section 7 of the *Telecommunications Act*, SC 1993, c 38 Telus submits that policy does not confer power.

[45] I agree that policy provisions of a statute do not themselves create the power to do certain things *(Barrie Public Utilities v Canadian Cable Television Assn*, 2001 FCA 236 at para 53, 202 DLR (4th) 272, Rothstein JA, as he then was, for the Court), however, the Minister has been provided with ample statutory power to make the Deemed Transfer Requirement.

[46] The *Department of Industry Act*, SC 1995, c 1, subsections 4(1)(k); gives broad powers to the Minister of Industry respecting telecommunication as to achieve the objectives of Parliament

set out under section 5 (*Telus v Canada*, *supra* at para 95). Subsection 4(1)(f) also gives the Minister authority under competition and restraint of trade, including mergers and monopolies, while section 6 prescribes how the Minister shall exercise his powers under section 4(1):

4. (1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any other department, board or agency of the Government of Canada, relating to	*4. (1) Les pouvoirs et fonctions du ministre s'étendent de façon générale à tous les domaines de compétence du Parlement non attribués de droit à d'autres ministères ou organismes fédéraux et liés :*
(f) competition and restraint of trade, including mergers and monopolies;	*f) à la concurrence et aux pratiques commerciales restrictives, notamment les fusions et les monopoles;*
(k) telecommunications, except in relation to	*k) aux télécommunications, sauf en ce qui a trait à la planification et à la coordination des services de télécommunication aux ministères et aux organismes fédéraux et à la radiodiffusion — à l'exception de la gestion du spectre et des aspects techniques de la radiodiffusion;*
(i) the planning and coordination of telecommunication services for departments, boards and agencies of the Government of Canada, and	
(ii) broadcasting, other than in relation to spectrum management and the technical aspects of broadcasting;	
...	*...*
5. The Minister shall exercise the powers and perform the duties and functions assigned by subsection 4(1) in a manner that will	*5. Le ministre exerce les pouvoirs et fonctions que lui confère le paragraphe 4(1) de manière à :*
(f) strengthen the framework for the development and	*f) renforcer la structure nécessaire à l'essor et à l'efficacité du marché canadien;*
	g) encourager la mise sur pied, le développement et l'efficacité des systèmes et installations de

efficiency of the Canadian marketplace;	*communications du pays et faciliter l'adaptation aux situations intérieure et internationale;*
(g) promote the establishment, development and efficiency of Canadian communications systems and facilities and assist in the adjustment to changing domestic and international conditions;	*...*
...	*6. Dans le cadre de la compétence visée au paragraphe 4(1), le ministre :*
6. In exercising the powers and performing the duties and functions assigned by subsection 4(1), the Minister shall	*a) conçoit, recommande, coordonne, dirige, favorise et met en oeuvre, à l'échelle nationale, des orientations, programmes, opérations et procédures propres à assurer la réalisation des objectifs mentionnés à l'article 5;*
(a) initiate, recommend, coordinate, direct, promote and implement national policies, programs, projects and practices with respect to the objectives set out in section 5;	

[47] The *Telecommunications Act*, supra, subsections 7(a), (b) and (c) state policy objectives that inform the exercise of the powers under section 5(1) of the *Radiocommunication Act*, supra:

7. It is hereby affirmed that telecommunications performs an essential role in the maintenance of Canada's identity and sovereignty and that the Canadian telecommunications policy has as its objectives	*7. La présente loi affirme le caractère essentiel des télécommunications pour l'identité et la souveraineté canadiennes; la politique canadienne de télécommunication vise à :*
(a) to facilitate the orderly development throughout Canada of a	*a) favoriser le développement ordonné des télécommunications partout au Canada en un système qui*

telecommunications system that serves to safeguard, enrich and strengthen the social and economic fabric of Canada and its regions;	*contribue à sauvegarder, enrichir et renforcer la structure sociale et économique du Canada et de ses régions;*
(b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;	*b) permettre l'accès aux Canadiens dans toutes les régions — rurales ou urbaines — du Canada à des services de télécommunication sûrs, abordables et de qualité;*
(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;	*c) accroître l'efficacité et la compétitivité, sur les plans national et international, des télécommunications canadiennes;*

[48] The *Radiocommunication Act*, supra, subsection 5(1)(a)(i.1), (b), (e) and (n) give broad powers respecting spectrum licences such as are at issue here (*Telus v Canada, supra* at para 94). Subsection 5(1.1) provides that the Minister may have regard to the objectives of section 7 of the *Telecommunications Act* in exercising said powers under subsection 5(1) of the *Radiocommunication Act*:

5. (1) Subject to any regulations made under section 6, the Minister may, taking into account all matters that the Minister considers relevant for ensuring the orderly establishment or modification of radio stations and the orderly development and efficient operation of radiocommunication in Canada,	*5. (1) Sous réserve de tout règlement pris en application de l'article 6, le ministre peut, compte tenu des questions qu'il juge pertinentes afin d'assurer la constitution ou les modifications ordonnées de stations de radiocommunication ainsi que le développement ordonné et l'exploitation efficace de la radiocommunication au Canada :*
(a) issue	*a) délivrer et assortir de*

...

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

...

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

...

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

...

(n) do any other thing necessary for the effective administration of this Act.

(1.1) In exercising the powers conferred by subsection (1), the Minister may have regard to the objectives of the Canadian telecommunications

policy set out in section 7 of the Telecommunications

Act.

conditions :

...

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

...

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

...

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

...

n) prendre toute autre mesure propre à favoriser l'application efficace de la présente loi.

(1.1) Dans l'exercice des pouvoirs prévus au paragraphe (1), le ministre peut aussi tenir compte de la politique canadienne de télécommunication

indiquée à l'article 7 de la Loi sur les télécommunications.

[49] The Minister has thus been provided with ample statutory authority under this interrelated statutory scheme to establish the Deemed Transfer Requirement. The latter is a national telecommunication policy (4(1)(k) and 6(a) of the *Department of Industry Act*) for the planning and allocation of the use of the spectrum resource (Section 5(1)(e) of the *Radiocommunication Act*) that leads to the amendment of the terms and conditions of spectrum licences (section 5(1)(b) of the *Radiocommunication Act)* in order to maximize economic and social benefits Canadians derive from the use of the spectrum resource including the efficiency and competitiveness of the Canadian telecommunications industry and the availability and quality of services to customers (section 7(a)-(c) of the *Telecommunications Act*).

Is the Minister Estopped from Enforcing the Deemed Transfer Requirements at Least as Against Telus?

[50] Telus argues that the Minister is estopped from enforcing the Deemed Transfer Requirements, at least as against Telus, by reason of what Telus describes as representations made by the Minister.

[51] When considering estoppel as against a public official such as the Minister, not only must private law principles be considered, but public law principles, as well. Private law principles were set out by the Supreme Court of Canada in *Maracle v Travellers Indemnity Co of Canada*, [1991] 2 SCR 50 where Sopinka J, for the Court, wrote at page 57:

> *The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was indented to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the*

> *representation, he acted on it or in some way changed his position.*

[52] The Supreme Court of Canada in *Mount Sinai Hospital Centre v Quebec (Minister of Health and Social Services)*, [2001] 2 SCR 281, was faced with whether it needed to consider estoppel from a public law point of view. Bastarache J, for the majority wrote, at paragraph 90, that the question before the Court did not require the application of public law promissory estoppel. Binnie J, writing for himself and the Chief Justice, did consider the matter on the basis of public law estoppel. At paragraph 47, Binnie J wrote:

> *However this is not a private law case. Public law estoppel clearly requires an appreciation of the legislative intent embodied in the power whose exercise is sought to be estopped. The legislation is paramount. Circumstances that might otherwise create an estoppel may have to yield to an overriding public interest expressed in the legislative text.*

[53] Most recently, the Supreme Court of Canada in *Immeubles Jacques Robitaille inc v Québec (Ville)*, [2014] 1 SCR 784, has endorsed what was said in *Maracle* and *Mount Sinai*. Wagner J, for the Court, wrote at paragraph 19:

> *19 In the public law context, promissory estoppel requires proof of a clear and unambiguous promise made to a citizen by a public authority in order to induce the citizen to perform certain acts. In addition, the citizen must have relied on the promise and acted on it by changing his or her conduct (Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services), 2001 SCC 41, [2001] 2 S.C.R. 281, at paras. 45-46 ("Mount Sinai"), quoting Maracle v. Travellers Indemnity Co. of Canada, [1991] 2 S.C.R. 50; J.-P. Villaggi, L'Administration publique québécoise et le processus décisionnel: Des pouvoirs au contrôle administratif et judiciaire (2005), at p. 329).*

[54] Mainville JA for the Federal Court of Appeal said that the application of the doctrine of promissory estoppel in respect of a public authority is narrow. He wrote at paragraph 38 of *Malcolm v Canada (Minister of Fisheries and Oceans)*, 2014 FCA 130, 460 NR 357:

> *38 Though the doctrine of promissory estoppel may be available against a public authority, including a minister, its application in public law is narrow. As noted by Binnie J. in his concurring opinion in Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services), 2001 SCC 41, [2001] 2 S.C.R. 281 (Mount Sinai) at para. 47, public law estoppel clearly requires an appreciation of the legislative intent embodied in the power whose exercise is sought to be estopped. The legislation is paramount. Circumstances that might otherwise create an estoppel may have to yield to an overriding public interest expressed in the legislative text.*

[55] Given the strict and narrow interpretation that must be given to the interpretation of the principles of promissory estoppel in this–public circumstance, the nature of the representation and the nature of the reliance must be examined.

[56] Telus asserts that the Minister made certain representations not uniquely to Telus, but to Telus and other bidders for AWS spectrum licences. I repeat paragraph 56 of Telus' memorandum:

> *56. The Minister clearly represented that TELUS (and other prospective bidders) would only be prohibited from acquiring the spectrum issued to new entrants for a period of five years. This representation was set out in the 2007 AWS Licensing Framework setting the rules for the AWS auction, the Responses to Questions for Clarification on the AWS Policy in February 2008, and in the final terms of the AWS spectrum licenses themselves. Those representations read as follows:*
>
> > *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 5 years from the date of issuance.*

> *Affidavit of Stephen Lewis, Exhibit "B", Applicant's Record Tab 2(1)(B), p. 55*
>
> *Licences acquired through the set-aside may not be transferred or leased to, or divided among companies that do not meet the criteria of a new entrant, for a period of five years from the date of issuance.*
>
> *Affidavit of Stephen Lewis, Exhibit "C", Applicant's Record Tab 2(1)(C), p. 102*
>
> *Licences acquired through the set-aside of spectrum (as defined in Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range) may not be transferred or leased to, acquired by means of a change of ownership or control of the licensee, divided among, or exchanged with companies that do not meet the criteria of a new entrant, for a period of 5 years from the date of issuance.*
>
> *Affidavit of Stephen Lewis, Exhibit "E", Applicant's Record tab 2(1)(E), p. 142*

[57] I agree with the Attorney General that nothing in these statements constitutes a statement, or even an implication that, at the end of five years a party may freely, without review or constraint by the Minister, licence or acquire any or all of the set-aside spectrum, nor do any of these statements constitute an undertaking or assurance by the Minister that, after five years, the Minister may decline to exercise discretion to manage the spectrum. I accept and adopt what the Attorney General set out at paragraphs 91 and 92 of his memorandum as to what was stated in the relevant documents and licences:

> *91. The Applicant's interpretation of the Minister's alleged* "representations" *ignores the clear statements in each of those documents that all licence transfers must be approved by the Minister:*
>
> > *<u>While all licence transfers must be approved by the Minister</u>, 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 5 years from the date of issuance.*
>
> *The licensee may apply to transfer its licence(s) in whole or in part (divisibility), in both bandwidth and geographic dimensions…Licensees acquired through the set-aside may not be transferred…with companies that do not meet the criteria of a new entrant, for a period of 5 years from the date of issuance…Departmental approval is required for each proposed transfer of a licence, whether the transfer is in whole or in part.*
>
> *Licences obtained through the set-aside cannot be transferred for five years to companies that do not meet the criteria to be a new entrant. The Minister of Industry retains the authority to review any requests for licence transfers under the Radiocommunication Act.*
>
> *[emphasis added to each quotation]*

92. *The Applicant's interpretation is also inconsistent with the explicit text of the conditions attaching to every spectrum licence issued following the AWS auction:*

> *The licensee 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 for each proposed transfer of a licence, whether the transfer is in whole or in part…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 licensee, divided among, or exchanged with companies that do not meet the criteria of a new entrant, for a period of 5 years from the date of issuance.*

[58] On this basis alone, Telus' argument as to estoppel fails. The Minister simply did not make a representation that would lead a reasonable person to believe that, after five years, the

acquisition or license of set-aside spectrum, by whatever means, would be unregulated by the Minister.

[59] To move to the next point, Telus argues that it relied on the Minister's representations, in particular it did not big aggressively on the spectrum auction because it believed that it could acquire some set-aside spectrum in five years. I find the evidence on this point wholly inadequate. The only evidence is a set of power point slides shown at some point at an in-house Telus meeting of some sort. Telus's witness, Lewis, simply asserts without further proof that Telus did not bid aggressively because it believed that it could acquire set-aside spectrum evidence in five years. This evidence is simply too scanty and too self-serving for this Court to make a finding of detrimental reliance.

[60] Further, even if Telus had such a belief, it completely ignores the fact that the third parties who received the set-aside spectrum may not wish to sell or licence that spectrum – or that others such as Bell or Rogers, may offer better terms and acquire or licence that spectrum rather than Telus. The matter is simply too speculative.

[61] Did Telus suffer any loss as a result of the so-called representations and the so-called reliance? Telus alleges that it put in a weak bid in the initial auction, however, there is no evidence that they sought to acquire or licence some or all of the set-aside spectrum, let alone that the Minister somehow interfered with or precluded that transaction. Five years have now elapsed, and there is no evidence on the point. The most that can be said is that Telus made a business gamble and lost. It is not the Minister's fault.

[62] Even taking Telus's allegation that it put in a weaker bid as fact, Telus failed to bring any evidence to demonstrate that the enactment of the Deemed Transfer Requirement constituted an extension of the five-year moratorium and prevented "a possibility of acquiring additional 'set-aside' spectrum from the 'new entrants' after the lapse of the five-year moratorium" (Paragraph 25 of Telus's Memorandum of Fact and Law). As Rogers submitted, Telus's submission that it suffered detrimental reliance rests on the speculative and fatally flawed assumption that the mere requirement to file an application for a Deemed Transfer qualifies as a detriment.

[63] I need not consider the public law estoppel issues as the estoppel argument simply fails on all of the above grounds.

V. CONCLUSION AND COSTS

[64] In conclusion, the application fails. Telus has not prevailed on the jurisdictional issues or the estoppel issue. No declaration of the kind sought by Telus will be made.

[65] The parties have made submissions as to costs subsequent to the hearing. Rogers and Shaw do not seek costs nor do they expect to pay any costs. I agree. The Respondent Attorney-General was successful and shall have his costs paid by the Applicant Telus. The parties have agreed that the sum of $12,367.44 including disbursements, is reasonable.

JUDGMENT

FOR THE REASONS PROVIDED:

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. The Applicant Telus shall pay the costs, including disbursements, of the Respondent Attorney-General fixed in the sum of $12,367.44. No other party shall pay or receive costs.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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