Public Version

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB/16/16

BETWEEN

GLOBAL TELECOM HOLDING S.A.E.

Claimant

and

GOVERNMENT OF CANADA

Respondent

CLAIMANT'S MEMORIAL ON THE MERITS AND DAMAGES

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29 September 2017

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I. INTRODUCTION

1. Global Telecom Holding S.A.E. ("**GTH**") is an Egyptian joint stock company listed on the Egyptian stock exchange,[1] offering leading mobile telecommunications services primarily in emerging, high-growth markets around the world.[2] For the past two decades GTH has successfully developed and operated telecommunications mobile networks in multiple high-growth jurisdictions, with a current licensed area covering a population of over 400 million individuals.[3] GTH submits this Memorial in respect of its claims against the Government of Canada ("**Canada**" or the "**Government**"), arising from Canada's unlawful treatment of GTH's investment. This Memorial is submitted in accordance with Procedural Order No. 1, dated 13 June 2017, and Rule 31 of the International Centre for Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings.

2. This Memorial proceeds as follows:

   (a) Part II provides an executive summary of Canada's wrongful conduct during the course of GTH's investment, in breach of its obligations under the *Agreement Between The Government Of Canada And The Government Of The Arab Republic Of Egypt For The Promotion And Protection Of Investments*, which entered into force on 3 November 1997 (the "**BIT**");[4]

   (b) Parts III and IV detail the facts relevant to this dispute. Specifically, Part III explains Canada's wireless telecommunications market and the framework at the time of GTH's decision to invest, including the relevant laws, regulations, policies and provisions Canada implemented to govern its 2008 auction of Advanced

[1] **Request for Arbitration**, Annex E. GTH previously was known as Orascom Telecom Holding S.A.E. or OTH.

[2] *See* **Exhibit C-248**, GTH, *Company Profile*, http://www.gtelecom.com/web/guest/company-profile (last visited 24 September 2017).

[3] *See* **Exhibit C-248**, GTH, *Company Profile*, http://www.gtelecom.com/web/guest/company-profile (last visited 24 September 2017).

[4] **Exhibit CL-001**, Agreement between the Government of Canada and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments, 3 November 1997 (English version) (hereinafter "**BIT**").

Wireless Services ("**AWS**") spectrum licenses (the "**2008 AWS Auction**") and to encourage investors to participate in this Auction. Part IV describes GTH's decision to invest in the new wireless operator "*Wind Mobile*" on the basis of this framework, the structure of GTH's investment, and GTH's key expectations at the time of its investment in Canada;

(c) Part V describes Canada's wrongful treatment of GTH's investment. In particular, having induced GTH's investment based on a framework designed to encourage New Entrants to participate in the 2008 AWS Auction, Canada not only failed to uphold key conditions of the framework but, most importantly, took away the safety net it offered prospective investors knowing that Canada's "*experiment*" to create competition might fail. Canada's wrongful measures include its: (*i*) duplicative and contradictory review of Wind Mobile's ownership and control; (*ii*) failure to facilitate reasonable regulatory conditions for New Entrants after the 2008 AWS Auction; (*iii*) arbitrary and nontransparent national security review of an application by Global Telecom Holding (Canada) Limited ("**GTHCL**"), a company controlled and wholly owned indirectly by GTH, to obtain voting control over Wind Mobile; and (*iv*) introduction of a new transfer framework to block GTH (after years of substantial investment) from selling Wind Mobile to an incumbent wireless carrier after a five-year restriction on such a sale had expired. As detailed in this Part, Canada's pervasive misconduct caused GTH to exit the Canadian wireless telecommunication market, and to sell Wind Mobile for whatever value it could recover;

(d) Part VI establishes the jurisdiction of this Tribunal and the law applicable to this dispute;

(e) Part VII addresses the legal merits of GTH's claims. Namely, as a result of the facts and misconduct described at Parts III through V, Canada has committed several breaches of its obligations under the BIT, including its obligations to accord GTH's investment fair and equitable treatment ("**FET**") and full protection and security ("**FPS**"), as well as the guarantees of the unrestricted free transfer of investments and national treatment protection;

(f) Part VIII quantifies the substantial damages resulting from Canada's breaches of the BIT; and

(g) Part IX concludes with GTH's request for relief.

II. EXECUTIVE SUMMARY

3. To facilitate the entry of new operators into the Canadian wireless telecommunications market, in 2007 and 2008 Canada implemented a series of measures designed to encourage investors to participate in an upcoming auction of AWS spectrum licenses. Canada recognized that there were substantial barriers to entry faced by new wireless operators ("**New Entrants**"),[5] which had historically prevented and dissuaded prospective investors from participating and succeeding in the market. In particular, the Canadian wireless telecommunications market had been dominated by three national wireless services providers: Rogers Communications Inc. ("**Rogers**"), Bell Canada ("**Bell**"), and TELUS Communications Company ("**Telus**"), (collectively, the "**Incumbents**"). The Government and prospective investors knew that the establishment of a successful new player would require a fair opportunity for New Entrants to compete with the Incumbents as well as investors willing to commit significant capital investment.

4. To convince prospective investors to participate in the 2008 AWS Auction, Canada introduced three key conditions in its framework for the 2008 AWS Auction (the "**2008 AWS Auction Framework**"):[6]

   (a) Canada set aside certain spectrum licenses that could only be bid on by New Entrants. This prevented Incumbents from out-bidding the New Entrants from the outset, as Incumbents were prepared to pay more for these licenses than the New Entrants;

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[5] "*New Entrants*" were defined as "*Any entity, including affiliates and associated entities, which holds less than 10 percent of the national wireless market based on revenue.*" **Exhibit C-004**, Industry Canada, *Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range*, November 2007 (hereinafter "**AWS Auction Policy Framework**"), p. 5.

[6] *See infra* Part III.B.

(b) The set-aside licenses provided that for the first five years of the license term, New Entrants would be subject to certain minimum rollout requirements, and would not be permitted to transfer their set-aside licenses to an Incumbent (the "**Five-Year Rollout Period**"). The duration of this five-year period was intentional: long enough to deter the hoarding of unutilized set-aside spectrum licenses by New Entrants, but short enough to afford investors in New Entrants a viable exit strategy for value should the market prove unable to sustain economically the New Entrant. Canada understood that an indefinite restriction on the transfer of set-aside spectrum licenses would deter potential investors from making the decision to invest in a New Entrant. Canada also understood that after the Five-Year Rollout Period, market forces would return and then determine the fate of the New Entrants.

(c) The Incumbents would be required to enter into roaming and tower and site-sharing agreements with New Entrants at "*commercial rates*." While the precise meaning of "*commercial rates*" was not defined and the precise rules and procedures of how such terms would be enforced through binding arbitration was not yet specified, these provisions demonstrated to potential investors that Canada was committed to establishing the market conditions necessary to provide New Entrants with a reasonable opportunity to compete successfully against the Incumbents. Canada understood that, without these measures, prospective investors would be reluctant to commit the substantial funds required to establish a new wireless telecommunications common carrier in a market dominated by the Incumbents.

5. These conditions were designed to: (*i*) encourage new investors prepared to commit the capital necessary to establish a viable wireless provider to bid in the 2008 AWS Auction; and (*ii*) deter speculators whose intention was to purchase set-aside spectrum licenses to sell (or "*flip*") them to an Incumbent thereafter at a profit, with no intention of utilizing the spectrum licenses. In other words, the Government was focused on attracting genuine investors who were serious about establishing operations in the Canadian wireless telecommunications market. It was aware that the 2008 AWS Auction Framework and key conditions enumerated above were necessary to provide New Entrants any reasonable prospect of success, and that, without these provisions, prospective investors would be unlikely to invest in a New Entrant.

6. While the Government stipulated provisions of roaming and tower sharing that were expected to give New Entrants a fair opportunity to establish operations over five years, the Government contemplated that these conditions might not result in the establishment of a viable New Entrant. As explained in testimony from **Michael Connolly**, then the Director General of Spectrum Management at Industry Canada, Canada intended to allow market forces to return after five years—*i.e.*, investors would no longer be precluded from selling the set-aside spectrum licenses to Incumbents—and Canada accepted the possibility that after five years there could be no New Entrants left.[7] As another senior Government official explained, the 2008 AWS Auction was an experiment:

> *We didn't have a view about what the ultimate market structure should be . . . No one knows ahead of time what these changes in market structure will produce, and technology is changing rapidly.* ***It was an experiment****. We had to see what would happen if we introduced more competition but not full competition.*[8]

7. Clearly, the outcome of this experiment (and whether any investor would want to sell to an Incumbent at the end of five years) depended in large part on whether the New Entrants were in fact given a fair opportunity to establish operations and compete with the Incumbents during the Five-Year Rollout Period.

8. In addition to the above, conditions for the 2008 AWS Auction, Canada's ownership and control rules (the "**O&C Rules**") limited the amount of voting shares a foreign investor

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[7] *See* **CWS-Connolly**, ¶ 13.

[8] **Exhibit C-183**, Rita Trichur, et al., *How Ottawa's plans to foster wireless competition sank*, THE GLOBE & MAIL, https://beta.theglobeandmail.com/report-on-business/how-ottawas-plan-to-foster-wireless-competition-sank/article12005826/ (last visited 24 September 2017) (quoting Paul Boothe, an Associate Deputy Minister of Industry from 2007 to 2010) (emphasis added).

could possess in a wireless telecommunications common carrier. Therefore, the O&C Rules required that if GTH, as a foreign investor, decided to invest in a wireless telecommunications common carrier, it would have to partner with a Canadian company.[9] At the time of the 2008 AWS Auction, the Government and telecommunications industry had long been anticipating the relaxation of the O&C Rules to allow a foreign investor like GTH to control a wireless telecommunications common carrier, although this change had not yet been implemented.[10] Accordingly, and with the knowledge of the Government, GTH structured its investment to allow GTH to avail itself of any future relaxation in the O&C Rules.[11]

9. As explained in testimony from **David Dobbie**, the Chief Regulatory Officer and in-house counsel at GTH during the relevant time period, GTH made the decision to invest in Canada relying on the 2008 AWS Auction Framework and conditions set out above.[12] GTH, along with its Canadian partner, established Wind Mobile as a New Entrant to participate in the 2008 AWS Auction. In July 2008, Wind Mobile was declared the provisional winner of C$ 442 million worth of set-aside spectrum licenses, and GTH paid for the set-aside spectrum licenses in August 2008. Well exceeding Canada's expectations, the 2008 AWS Auction generated almost C$ 4.3 billion in revenue for Canada, with twelve New Entrants purchasing set-aside spectrum licenses.[13]

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[9] *See infra* Part III.B.7.

[10] *See infra* Part V.C.1.a.

[11] *See infra* Part IV.B.1.

[12] *See* **CWS-Dobbie**, ¶¶ 10-13.

[13] *See infra* Part IV.A.

10. By the time GTH exited from Canada in September 2014, GTH had invested over C$ 1.3 billion in Wind Mobile (not including accrued interest on its loan investments). GTH epitomized exactly the type of committed investor that Canada had sought to induce into the wireless telecommunications market through the 2008 AWS Auction. As required and encouraged by the Framework created by Canada, from the outset, GTH committed very substantial funds and resources into Wind Mobile, which enabled Wind Mobile to become the strongest New Entrant in the market.[14]

11. Yet, despite this, Canada failed to uphold its end of the bargain, and used its sovereign authority both to change the rules and to orchestrate the application of existing rules to GTH's detriment without any consideration for the extreme unfair consequences for GTH, or the fact that Canada's conduct would cause the loss of the entirety of GTH's C$ 1.3 billion investment. David Dobbie summarizes the dilemma in which GTH found itself:

> *We did everything the Government asked-we made the largest new investment, creating the most successful New Entrant, but the Government failed to uphold its part of the bargain at GTH's expense.*[15]

12. Instead of upholding the provisions laid out to attract investors, Canada put in place a series of measures that undermined the very regulatory framework Canada had created to induce GTH's investment, ultimately leaving GTH with no choice but to exit the Canadian market.

13. *First*, at the outset of GTH's investment, Canada impeded GTH's efforts by subjecting Wind Mobile to a duplicative and contradictory review of its compliance with Canada's O&C Rules. This process was unfair on a number of levels. First, the Canadian Radio-

[14] *See infra* Part IV.

[15] **CWS-Campbell**, ¶¶ 20-21.

television and Telecommunications Commission ("**CRTC**") undertook this duplicative review after the Government (through Industry Canada) had already conducted precisely the same review and found (following an extensive process) that GTH was in compliance with the O&C Rules. Both reviews were conducted after GTH had paid C$ 442 million for Wind Mobile's set-aside spectrum licenses. Second, at the behest of the Incumbents, the CRTC conducted a subsequent review through a newly established, onerous, public review process, which was specifically targeted at Wind Mobile, and which resulted in further significant delays in Wind Mobile's eventual market entry. Third, the CRTC arbitrarily (and wrongly) determined that Wind Mobile was not qualified to operate as a telecommunications common carrier in Canada, in complete contradiction to the Government's prior conclusion.

14. The detrimental effect on Wind Mobile was serious. **Ken Campbell**, Wind Mobile's previous Chief Executive Officer ("**CEO**"), describes that Wind Mobile could not commence operations during the critical early period of its business when it was essential to move quickly to gain a competitive advantage.[16] Instead, Wind Mobile was embroiled in duplicative, protracted, expensive, and wholly unnecessary regulatory proceedings for 7 months that ultimately confirmed what Industry Canada had determined from the outset: that Wind Mobile complied with the O&C Rules.[17]

15. *Second*, despite the rhetoric in the licenses and policy documents, Canada failed to take any steps to establish (or even foster) the market conditions necessary to provide New

[16] **CWS-Campbell**, ¶¶ 20-21.

[17] *See infra* Part V.A.2.

Entrants with a reasonable opportunity to compete successfully against the Incumbents. It quickly became apparent that the provisions Canada had introduced in its 2008 AWS Auction Framework to promote fair market conditions were meaningless, and that the Government had no intention of taking action to ensure mandatory roaming and tower sharing on commercial, viable and fair terms. When Canada finally began to address these issues in 2013, the New Entrants were already four years into the Five-Year Rollout Period, constituting far too little, too late.[18] This failure by the Government also meant the Government's "*experiment*" had no chance of producing viable New Entrants, and New Entrants were forced to rely increasingly on the prospect of selling to an Incumbent after five years if they were to have any chance of recovering the funds they invested (or any significant part thereof).

16. *Third*, in June 2012, after years of protracted and expensive proceedings challenging Wind Mobile's compliance with the O&C Rules, Canada relaxed the O&C Rules[19] (as had always been expected), but then prevented GTH from exercising its contractual right to benefit from such change and take voting control over Wind Mobile. This was particularly egregious given that the Government knew that GTH's investment had been expressly structured to allow GTH to take advantage of the long-anticipated relaxation in the O&C Rules. This was a common feature of Canadian investment agreements involving foreign investors[20] and this provision had been explicitly highlighted to Industry Canada at the time

[18] *See infra* Part V.B.

[19] *See infra* Part V.C.1.a.

[20] *See infra* Part V.A.1.

of the investment was made, but Industry Canada raised no issues. Thus, when GTHCL[21] duly submitted its application to take voting control over Wind Mobile in October 2012 ("**Voting Control Application**"),[22] GTH expected this to be a short and uncontroversial process.

17. However, in response, Canada informed GTHCL that the Application had triggered unidentified "*national security*" concerns. [redacted]

[21] GTHCL was controlled and wholly owned indirectly by GTH.

[22] *See infra* Part V.C.1.b.

[23] *See infra* Part V.C.1.b.

18. The realization that, in the eyes of Canada, GTH and its shareholders posed unspecified national security concerns [redacted] Indeed, GTH had already invested more than any of the other investors in the 2008 AWS Auction (C$ 1.3 billion in Wind Mobile) in reliance on Canada's 2008 AWS Auction Framework and the representations regarding GTH's ability to take control of Wind Mobile if the O&C Rules were relaxed. [redacted]

19. *Fourth*, just when GTH really needed to exit its investment as a result of Canada's unfair measures, Canada blocked GTH from exiting through a sale to an Incumbent notwithstanding that the Five-Year Rollout Period had expired. This prevented GTH from recovering any value from its C$ 1.3 billion investment.

20. As a result of the Government's failure to establish fair market conditions in which the New Entrants could compete, by the end of the Five-Year Rollout Period, the Incumbents were the buyers likely to pay the highest price for a New Entrant. [redacted] which was consistent with the universal understanding by everyone at the time of GTH's investment—including the Government[25]—that a sale to an Incumbent after the Five-Year Rollout Period would be permitted.[26]

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[24] *See infra* Part V.C.2.a.

[25] *See* **CWS-Connolly**, ¶¶ 13, 17.

[26] *See infra* Part IV.C.

21. However, once again, Canada abandoned the regulatory framework and expectations it had created to induce GTH's investment. In response to press reports that New Entrants like Wind Mobile were seeking to consolidate with the Incumbents, Canada announced in March 2013 that it would change the rules to prevent GTH and other New Entrants from transferring their set-aside spectrum licenses to an Incumbent after the Five-Year Rollout Period had expired.[27] In June 2013, after a rapid consultation process, Canada released its new, restrictive transfer framework effectively barring GTH from ever selling Wind Mobile to an Incumbent. With this new framework, Canada announced that it would use "*every tool*" (in its unique sovereign power) to ensure that there would be a "*fourth player*" to compete with the Incumbents in each region. This constituted an entirely new policy objective and a reversal of the conditions contained in the 2008 AWS Auction Framework that had induced GTH to invest in Canada. In short, the Government would force at least one of the New Entrants to remain in the market regardless of the damage this caused to their investors, or whether it frustrated those investors' legitimate expectations.[28]

22. This was in marked contrast to the regime established at the time of the 2008 AWS Auction that, after the Five-Year Rollout Period, market forces would return and investors would be allowed (if they so wished) to realize the value of their investment by selling their set-aside spectrum licenses to an Incumbent. At that time, Canada recognized that its policies could not guarantee viable entry for New Entrants, and clearly understood that to induce

[27] *See infra* Part V.C.2.b.

[28] *See infra* Part V.C.2.d

investment in Canada's wireless telecommunications market, prospective investors would require this exit option.[29]

23. Paradoxically, this new transfer framework meant that GTH—having been the investor who committed the most funds to position Wind Mobile as the strongest of the New Entrants (and most likely to be capable of becoming a viable fourth player)—was the least likely investor to be allowed by Canada to recover value on its investment through a sale to an Incumbent.

24. Canada's actions (and inactions) amount to substantial breaches of its obligations under the BIT. In particular, these prejudicial actions collectively, and in some cases individually, amount to a breach of Canada's obligations to accord FET and FPS to GTH's investment in Canada. As a consequence of its pattern of negative treatment, Canada had left GTH in an impossible position:

(a) At the outset, Canada subjected Wind Mobile to a wholly duplicative review of its ownership and control which resulted in a Government decision in direct contradiction to a prior Government decision, and caused significant delay to the commencement of operations. This constituted part of Canada's cumulative breach of the FET and FPS protections required by the BIT;[30]

(b) Having encouraged GTH to invest C$ 1.3 billion into Canada on the basis of the key conditions outlined in its 2008 AWS Auction Framework, the Government failed to establish the regulatory conditions it knew were necessary to provide New Entrants any reasonable chance of success. This further constituted part of Canada's cumulative breach of the FET and FPS protections required by the BIT;[31]

(c) Canada then further compounded the damage it had caused to GTH by subjecting GTH and its shareholders to an arbitrary national security review [redacted]

[29] *See* **CWS-Connolly**, ¶¶ 13, 17.

[30] *See infra* Parts VII.A.4 and VII.B.

[31] *See infra* Parts VII.A.4 and VII.B.

[redacted] Canada reached this conclusion despite relaxing the O&C Rules, despite knowing that GTH had structured its investment from the outset to avail itself of any such change, and despite having subjected GTH to two extensive and contradictory ownership and control reviews. In addition to forming part of Canada's cumulative breaches of FET and FPS, this amounts to separate and independent breaches of Canada's obligations to accord FET and national treatment protections;[32] and

(d) Finally, just when GTH had been told that it would never be permitted to exercise voting control over its substantial investment (despite the relaxation of the O&C Rules) and was looking to exit the Canadian market, Canada changed the rules to prevent GTH from selling its investment to an Incumbent, notwithstanding that the Five-Year Rollout Period had expired. This change frustrated GTH's expectations formed at the time of the 2008 AWS Auction, and further compounded Canada's cumulative breaches of FET and FPS. Moreover, Canada's blocking of GTH's right to sell to an Incumbent after the Five-Year Rollout Period constitutes stand-alone and independent breaches of FET and the guarantee of free transfer of GTH's investment.[33]

25. As a result of the Government's failures, GTH was left without a commercially reasonable basis to continue funding Wind Mobile, and GTH had no viable option but to exit the Canadian market and recover whatever value it could by selling Wind Mobile to a non-Incumbent.[34] As explained by **Andy Dry**, Director Corporate Finance at GTH's majority shareholder VimpelCom Ltd. ("**VimpelCom**"),[35] Wind Mobile was sold in September 2014 to a consortium of non-Incumbent investors for approximately C$ 295 million, the best price achievable at the time.[36] In this transaction, the purchasers agreed to acquire C$ 135 million worth of debt owed to VimpelCom as well as C$ 160 million in vendor

[32] *See infra* Parts VII.A.3, VII.A.4, VII.B, and VII.D.

[33] *See infra* Parts VII.A.2, VII.A.4, VII.B, and VII.C.

[34] *See infra* Part V.D.

[35] Now known as VEON Ltd.

[36] *See* **CWS-Dry**, ¶ 31 (describing the value as approximately C$ 300 million); **CER-Dellepiane/Spiller**, ¶ 40.

loans, while GTH received virtually nothing.[37] The value of this transaction was far below the price Wind Mobile would have been worth *but-for* Canada's breaches.

26. While Canada's breaches of the BIT caused substantial harm to GTH, the Government and Wind Mobile's new owners reaped the benefits of GTH's investment. Less than a year after GTH had been compelled to sell Wind Mobile, Canada intervened further to create a viable fourth player by manipulating the allocation of spectrum through an orchestrated license approval process under its transfer powers acquired in 2013. Canada directed a spectrum license transfer arrangement in which it allowed Rogers (a Canadian Incumbent) to acquire Mobilicity (a New Entrant) as well as set-aside spectrum licenses from Shaw Communications Inc. ("**Shaw**") (a Canadian media company but New Entrant in the wireless sector) on the condition that Rogers transfer to Wind Mobile (by then a Canadian-owned New Entrant) substantial amounts of these set-aside spectrum licenses. Shortly thereafter, with these new licenses in hand, Wind Mobile's new owners on-sold Wind Mobile to Shaw for C$ 1.6 billion. In other words, Canada orchestrated exactly what it wanted—its fourth player in Canadian hands—but achieved this entirely at the expense of GTH.[38]

27. This was the opposite of the stable and transparent environment offered by Canada's 2008 AWS Auction Framework that GTH believed it had invested in. Indeed, GTH would likely not have invested in Canada at all, and certainly would not have done so for the amounts and on the terms that it did, had Canada been transparent at the outset regarding the

[37] In the transaction, GTH received only C$ 11. *See* **CER-Dellepiane/Spiller**, ¶ 40.

[38] *See infra* V.E.

treatment GTH could expect for the duration of its investment—namely: (*i*) that for four years the Government would take no meaningful steps to support the market conditions that it knew were necessary to allow New Entrants to succeed; (*ii*) that Canada would never allow GTH to take control over its investment despite the relaxation in the O&C Rules; (*iii*) that GTH would never be allowed to realize value on its investment by selling Wind Mobile to an Incumbent; and (*iv*) that by investing the most funds, GTH would end up being the least likely investor to recover value.[39] As David Dobbie confirms:

> *GTH would not have been likely to invest in Canada, and certainly not at the price we bid in the auction, had we been informed at the outset that we would not be allowed to sell our investment to an Incumbent. It is now also clear that the Government was not serious in its representations to us regarding roaming and tower sharing; and that we were misled regarding GTH's ability to take control of Wind Mobile when the O&C Rules were relaxed. Had we known any of these facts at the time, we would have unquestionably reconsidered investing at all, and certainly at the price paid.*[40]

28. As referenced above, Canada's pattern of unlawful conduct, which occurred over the duration of GTH's investment, amounts to multiple breaches of the BIT,[41] which individually and collectively caused GTH very substantial damage.[42] **Santiago Dellepiane and Pablo Spiller of Compass Lexecon** have calculated the losses to GTH caused by Canada's breaches to be US$ 1.75 billion.[43] Canada must now fully compensate GTH to rectify its misconduct and make GTH whole.

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[39] *See* **CWS-Dobbie**, ¶ 38.

[40] *See* **CWS-Dobbie**, ¶ 41.

[41] *See infra* Part. VII.

[42] *See infra* Part VIII.

[43] **CER-Dellepiane/Spiller**, Table 1.

III. CANADA'S WIRELESS TELECOMMUNICATIONS MARKET AND FRAMEWORK FOR THE 2008 AWS AUCTION

29. This section provides a brief introduction to wireless telecommunications services, and an overview of the relevant Canadian Government authorities, the state of the Canadian wireless telecommunications market leading up to the 2008 AWS Auction, and the framework Canada put in place at the time of this Auction.

A. Overview Of Canada's Wireless Telecommunications Market Leading Up To The 2008 AWS Auction

1. Introduction to Wireless Telecommunications

30. Wireless telecommunications require access to radio frequency spectrum.[44] Radio frequency spectrum can be divided into different bands, which can be used by different communications services, including broadcasting, cellular, and satellite.[45] For example, AWS (or "*advanced wireless services*") is the spectrum band designated for mobile wireless services, including voice, data, video, and messaging.[46]

31. Spectrum allocation is under the mandate of the Minister of Industry and Industry Canada,[47] which grant spectrum licenses that authorize a licensee to utilize a specific frequency, or

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[44] **Exhibit C-052**, Industry Canada, *Spectrum Policy Framework for Canada (DGTP-001-07)*, June 2007 (hereinafter "**Spectrum Policy Framework**"), p. 1.

[45] **Exhibit C-052**, Spectrum Policy Framework, p. 1.

[46] **Exhibit C-050**, Industry Canada, *Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services (DGTP-002-07)*, February 2007 (hereinafter "**AWS Auction Consultation**"), p. ii.

[47] **Exhibit C-057**, Radiocommunication Act, R.S.C., 1985, c. R-2, § 5(1); **Exhibit C-050**, AWS Auction Consultation, Part II, § 2.4.1.

frequency block, within a defined geographical area under certain pre-defined constraints.[48] Once authorized, licensees are permitted to establish and modify their radio communication networks within the scope of the conditions identified in their spectrum license.[49]

32. For this reason, spectrum licenses are the fundamental assets of a wireless telecommunications company. Licenses are inherently valuable as both revenue generating assets (derived from use by the licensee of the particular spectrum for the provision of telecommunications services) and as stand-alone assets with significant resale value.[50] On this basis, understanding the scope of a licensee's ability to transfer a spectrum license in the context of a sale is critical to determine the value of that license.[51] The certainty and predictability of this right are similarly important.[52]

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[48] *See generally* **Exhibit C-052**, Spectrum Policy Framework.

[49] **Exhibit C-003**, Industry Canada, *Licensing Procedure for Spectrum Licences for Terrestrial Services (CPC-2-1-23, Issue 2)*, September 2007 (hereinafter "**Spectrum Licensing Procedure**"), § 4.

[50] *See generally* **Exhibit C-059**, McLean Foster & Co., *Study of Market-based Exclusive Spectrum Rights*, 31 August 2007, https://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/market_based_rights-droits_axes_sur_le_marche-eng.pdf/$FILE/market_based_rights-droits_axes_sur_le_marche-eng.pdf (last visited 24 September 2017); **CER-Dellepiane/Spiller**.

[51] *See generally* **Exhibit C-059**, McLean Foster & Co., *Study of Market-based Exclusive Spectrum Rights*, 31 August 2007, https://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/market_based_rights-droits_axes_sur_le_marche-eng.pdf/$FILE/market_based_rights-droits_axes_sur_le_marche-eng.pdf (last visited 24 September 2017); **Exhibit C-165**, Rogers, *Comments of Rogers Communications: Consultation on considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences (DGSO-002-13)*, 3 April 2013, ¶¶ 23-24 ("*From the bidder's perspective, certainty of terms is essential to the process of valuing the spectrum and considering how much to bid in a particular market. . . . One of the most important rights associated with auctioned spectrum is the right to sell it in the aftermarket*."); **CWS-Dry**, ¶ 14.

[52] *See* **Exhibit C-041**, Industry Canada, *Framework for Spectrum Auctions in Canada (Issue 2)*, October 2001 (hereinafter "**2001 Spectrum Auction Framework**"), § 4. ("*Understanding exactly what is being auctioned is very important for bidders to develop business plans, secure adequate financing and develop a bidding strategy. While upholding the status of radio spectrum as a public natural resource, it is important to provide bidders, and subsequently licensees,* ***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*" (emphasis added)); **Exhibit C-038**, Industry Canada, *Framework for Spectrum Auctions in Canada*, August 1998 (hereinafter "**1998 Spectrum Auction Framework**"), § 6 ("*it is important to provide bidders, and subsequently licensees,* ***with an attractive package of licence attributes*** *so as to enhance their abilities to secure financing, to*

33. To realize the revenue generating value of a spectrum license, the licensee has to utilize its license to operate a telecommunications network. The rollout of a new network is capital intensive, requiring the development of infrastructure to support coverage across the geographical area of the license, and dependent on the ability of the operator to utilize the infrastructure (such as towers) and network, of any other operators with coverage of the same area.[53]

invest in their networks, and to provide the best possible services to Canadian consumers" (emphasis added)). Indeed, "*clarity and predictability*" were ostensibly the goals of Canada's 2013 new transfer framework discussed in detail at Part V.C.2.d. *See* **Exhibit C-193**, Industry Canada, *Speech: Speaking Points – The Honourable Christian Paradis, PC, MP, Minister of Industry, Telecommunications Announcement*, 4 June 2013, https://www.canada.ca/en/news/archive/2013/06/telecommunications-announcement.html (last visited 24 September 2017); **Exhibit C-156**, Industry Canada, *Speech: Speaking Points – The Honourable Christian Paradis, PC, MP, Minister of Industry, New measures to increase competition in the wireless sector*, 7 March 2013, https://www.canada.ca/en/news/archive/2013/03/new-measures-increase-competition-wireless-sector.html (last visited 24 September 2017) ("*In order for wireless providers to invest in new spectrum and new services for Canadians, they need greater certainty over the next few years*.").

[53] *See* **CWS-Campbell**, ¶ 9.

2. Canada's Wireless Telecommunications Market At The Time Of The 2008 AWS Auction

34. Oversight over the Canadian wireless telecommunications industry is exercised in significant part by three Canadian government authorities: Industry Canada[54] under the Minister of Industry;[55] the CRTC;[56] and the Competition Bureau.[57]

35. Over the past several decades, the wireless telecommunications market in Canada has experienced rapid and sustained growth, adding millions of subscribers each year.[58] At the time of the 2008 AWS Auction, revenues in the wireless sector had continued to increase

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[54] Now known as "*Innovation, Science and Economic Development Canada*," Industry Canada is the department responsible for the day-to-day implementation of telecommunications policy and wireless spectrum management. *See* **Exhibit C-044**, Department of Industry Act, S.C. 1995, c. 1, §§ 2(1), 4(1)(k).

[55] During the course of the events relevant to the dispute, the Minister of Industry role was handed over several times. The relevant Ministers of Industry were: Maxime Bernier (6 February 2006 – 14 August 2007); Jim Prentice (14 August 2007 – 29 October 2008); Tony Clement (30 October 2008 – 18 May 2011); Christian Paradis (19 May 2011 – 14 July 2013); and James Moore (15 July 2013 – 4 November 2015). *See* **Exhibit C-249**, Industry Canada, *Ministers of Industry*, https://www1.ic.gc.ca/eic/site/icgc.nsf/eng/00024.html#IC (last visited 24 September 2017).

[56] The CRTC is an administrative tribunal within the Government responsible for regulating and supervising Canada's telecommunication system (among other areas). Pursuant to the Telecommunications Act, the CRTC has oversight over the telecommunications regime and is responsible for the regulation of telecommunications carriers including rates, facilities and services. *See* **Exhibit C-253**, CRTC, *Our Mandate, Mission, and What We Do*, http://www.crtc.gc.ca/eng/acrtc/acrtc.htm (last visited 24 September 2017); **Exhibit C-050**, AWS Auction Consultation, Part II, § 2.4.1.

[57] The Competition Bureau is an independent law enforcement agency which seeks to maintain market competition in Canada. Headed by the Commissioner of Competition, the Bureau is responsible for the administration and enforcement of (*inter alia*) the Competition Act. This includes assessing abuse of dominance by market participants and the impact of mergers on competition within particular sectors (including telecommunications). *See* **Exhibit C-252**, Competition Bureau, *Our organization*, http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00125.html (last visited on 24 September 2017); **Exhibit C-050**, AWS Auction Consultation, Part II, § 2.4.3.

[58] **Exhibit C-079**, CRTC, *Communications Monitoring Report*, July 2008 (hereinafter "**2008 CRTC Report**"), p. 231 (Table 5.5.1); **Exhibit C-056**, CRTC, *CRTC Telecommunications Monitoring Report: Status of Competition in Canadian Telecommunications Markets: Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services* (hereinafter "**2007 CRTC Report**"), p. 92 (Table 4.6.1); **Exhibit C-047**, CRTC, *CRTC Telecommunications Monitoring Report: Status of Competition in Canadian Telecommunications Markets: Deployment/Accessibility of Advanced Telecommunications Infrastructure and Services*, July 2006 (hereinafter "**2006 CRTC Report**"), p. 78 (Table 4.6.1). *See also* **Exhibit C-050**, AWS Auction Consultation, § 2.4.2, p. 17.

(totaling approximately C$ 14.4 billion in 2007),[59] as did the ARPU (average revenue per user/subscriber).[60]

36. Despite the rapidly expanding market, Canada was lagging behind other comparable countries in wireless penetration rates (*i.e.*, the number of wireless subscriptions per 100 people), which at this time were slightly over 60%.[61] Analysts attributed this under-penetration of the market to the fact that the market had been dominated by the three Incumbent carriers—Rogers, Telus, and Bell—who accounted for over 90% of the wireless market.[62] In 2007, Canadian consumers paid more for services packages than peers in countries like the U.K., Sweden, and Denmark.[63]

37. At the time of the 2008 AWS Auction, the Government placed an increasing emphasis on the reliance on market forces to spur innovation and competition in the wireless telecommunications market, while seeking to encourage new entry to develop alternative networks.[64] Historically, Industry Canada encouraged new entry by setting limits on the

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[59] **Exhibit C-079**, 2008 CRTC Report, Table 5.5.1 (excluding paging revenues).

[60] **Exhibit C-079**, 2008 CRTC Report, p. 227; **Exhibit C-056**, 2007 CRTC Report, p. 97; **Exhibit C-047**, 2006 CRTC Report, p. 80. *See also* **Exhibit C-050**, AWS Auction Consultation, § 2.4.2.

[61] **Exhibit C-079**, 2008 CRTC Report, p. 228.

[62] **Exhibit C-079**, 2008 CRTC Report, p. 227; **Exhibit C-056**, 2007 CRTC Report, p. 92; **Exhibit C-047**, 2006 CRTC Report, p. 83.

[63] **Exhibit C-061**, Industry Canada, *Government Opts for More Competition in the Wireless Sector*, 28 November 2007, https://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf10021.html#nr (last visited 27 September 2017) ("*While international price comparisons are challenging, most publicly available studies suggest that prices in Canada are not as competitive as they could be. In particular, there appears to be a consistent view that prices charged for very high use packages and for data (Internet) services are relatively high in Canada. For example: The OECD Communications Outlook 2007 compared wireless prices in 30 countries. They found that the service package most comparable to what average Canadians use was more expensive in Canada than in eight other countries like the U.K., Sweden and Denmark. For other packages, Canada ranked 12th and 22nd.*").

[64] *See* **CWS-Connolly**, ¶¶ 6-10, 12. This policy approach was supported by the telecommunications policy objectives in Section 7 of the Telecommunications Act as well as by the 2006 Telecommunications Policy Direction to the CRTC which underscored the importance that the Government placed on market forces as a means to achieve policy objectives in the telecommunications sector. *See* **Exhibit C-046**, Telecommunications

amount of spectrum licenses a bidder could purchase at an auction during the license allocation stage (referred to as "*spectrum caps*" or "*spectrum aggregation limits*") which curtailed an Incumbent's ability to purchase additional spectrum licenses;[65] and by implementing rollout requirements, to ensure that licensees utilized the spectrum licenses and to deter spectrum warehousing (*i.e.*, the hoarding of spectrum licenses without use) or speculative purchase (*i.e.*, the purchase of spectrum licenses for immediate re-sale).[66]

38. In 1995, Canada had issued PCS spectrum licenses to both Microcell Telecommunications Inc. ("**Microcell**") and Clearnet Communications ("**Clearnet**"), who were New Entrants in the market at this time.[67] The PCS spectrum licenses were issued to Microcell and Clearnet in a "*beauty contest*" (by a process of comparative review of applications rather than by auction) and were subject to a three-year prohibition on the transfer of licenses.[68] Once the three-year period had expired, Industry Canada approved the sale of these

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Act, S.C. 1993, c. 38 (hereinafter "**Telecommunications Act**"), § 7; **Exhibit C-049**, Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives, P.C. 2006-1534, 14 December 2006.

65 **Exhibit C-050**, AWS Auction Consultation, Part II, § 2.7.2.

66 **Exhibit C-038**, 1998 Spectrum Auction Framework, § 6.6 (describing that rollout requirements "*generally stipulate that a licensee provide service to a certain percentage of the population in its licence area within a specified time frame*"); **Exhibit C-004**, AWS Auction Policy Framework, p. 10.

67 *See* **CWS-Connolly**, ¶ 5.

68 **Exhibit C-036**, Industry Canada, *Policy and Call for Applications — Wireless Personal Communications Services in the 2 GHz Range — Implementing PCS in Canada*, 15 June 1995, § 6.8.3 ("*Transfer of authorizations - Consistent with general policy in this area and the specific provisions of section 18 of the General Radio Regulations II, the transfer of an authorization to another party will not be allowed without a full review of the application by Industry Canada and the approval of the Minister. In the absence of exceptional circumstances, no transfer of authorizations will be permitted in the first three years after the award of an authorization granted pursuant to this policy to provide PCS.*"). *See also* **CWS-Connolly**, ¶ 5.

businesses to Incumbents: Telus purchased Clearnet for C$ 6.6 billion in 2000;[69] and Rogers purchased Microcell for C$ 1.4 billion in 2004.[70]

39. It was against this background that the Government introduced the 2008 AWS Auction.

B. The 2008 AWS Auction Framework And Its Key Conditions

40. In 2007, Industry Canada initiated the consultation phase for the 2008 AWS Auction.[71] Industry Canada saw this auction as an opportunity to facilitate market entry of new operators.[72] From February 2007 until March 2008 (the deadline to apply for the 2008 AWS Auction), Industry Canada released a series of documents outlining the key policies and procedures applicable to the 2008 AWS Auction and its prospective participants (these documents, and the conditions contained in these documents, are referred to herein as the "**2008 AWS Auction Framework**"). These documents, discussed

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[69] *See* **Exhibit C-040**, Telus, *TELUS and Clearnet to create Canada's largest wireless company*, 21 August 2000, http://about.telus.com/community/english/news_centre/news_releases/blog/2000/08/21/telus-and-clearnet-to-create-canadas-largest-wireless-company (last visited 24 September 2017); **Exhibit C-250**, Industry Canada, *Archived—A Brief History of Cellular and PCS Licensing*, http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf08408.html (last visited 24 September 2017). *See also* **CWS-Connolly**, ¶ 5.

[70] *See* **Exhibit C-043**, *Rogers Wireless trumps Telus with CAD $1.4B bid for Microcell*, CBC, 20 September 2004, http://www.cbc.ca/news/business/rogers-wireless-trumps-telus-with-1-4b-bid-for-microcell-1.509637 (last visited 24 September 2017). *See also* **CWS-Connolly**, ¶ 5.

[71] *See* **Exhibit C-050**, AWS Auction Consultation.

[72] **Exhibit C-050**, AWS Auction Consultation, Part II, § 2.7 ("*Given expressed interest in this spectrum and the preceding discussion, an important consideration is whether it is appropriate to take measures intended to enable entry in a situation where the government controls access to the spectrum needed for market entry*."); **Exhibit C-004**, AWS Auction Policy Framework, p. 4 ("*The measures being taken are intended to ensure an opportunity for entry by addressing the potential to exploit spectrum as an entry barrier. The department is satisfied that the potential benefits of new entry warrant these measures*."); **Exhibit C-048**, Industry Canada, *Spectrum Policy Provisions and Consultation on a Framework to Auction Spectrum in the 2 GHz Range for Advanced Wireless Services: Briefing to ADM SITT*, 21 November 2006 [ATI Document] (describing at Slide 6 "[t]*hat the auction is a unique opportunity for creating opportunity for new market entry*"). Certain documents exhibited to this Memorial were obtained from the Canadian Government through an Access to Information ("**ATI**") request made by GTH's Canadian telecommunications expert. Markings reflected in these documents are as provided in the originals. Redactions reflected in these documents have been made by the Government. All documents obtained through ATI requests have been identified accordingly. *See also* **CWS-Connolly**, ¶ 5.

in detail below, established the following key conditions to promote market entry by for new operators:

(a) **Set-aside spectrum licenses**: Canada acknowledged that Incumbents have incentives to pay a premium for spectrum licenses thereby limiting, or barring entirely, a New Entrant's access to spectrum. On this basis, Canada decided to set-aside certain spectrum for bidding only by New Entrants.

(b) **Mandatory roaming**: Canada recognized that the inability to roam outside one's own network was a substantial barrier to market entry. Canada therefore required Incumbents to provide to all cellular, PCS and AWS licensees roaming outside of a licensee's territory for at least the ten-year term of the AWS license ("*out-of-territory*" roaming), as well as roaming within a New Entrant's licensed areas ("*in-territory*" roaming) for five years while the licensee built out its network. Incumbents were required to provide roaming at commercial rates reasonably comparable to rates currently charged to others for similar services. In the event that Incumbents failed to negotiate in good faith or expeditiously, there would be a binding arbitration mechanism to resolve the dispute.

(c) **Mandatory tower and site-sharing**: Canada also recognized that the inability for a New Entrant to access towers and sites, in addition to their high capital cost, was another significant barrier to market entry. Canada required Incumbents to allow access to antenna tower and site sharing and prohibited exclusive site arrangements. Incumbents were required to provide tower and site sharing at commercial rates that were reasonably comparable to rates charged to others for similar access. In the event that Incumbents failed to negotiate in good faith or expeditiously, there would be a binding arbitration mechanism to resolve the dispute.

41. Canada was aware that the above conditions were important to encourage new investors to participate in the 2008 AWS Auction.[73] Canada also implemented further measures to discourage participation by investors who might seek to undermine the purpose of the set-

[73] **CWS-Connolly**, ¶¶ 12-13, 17. As Canada would later summarize, during the 2008 AWS Auction, "*Spectrum was set-aside in the AWS auction, and roaming / tower sharing rules imposed, to facilitate new players*." **Exhibit C-131**, Email from Rebecca Guillemette to Cindy-Lee Cook, et al., 10 December 2012, *attaching* Industry Canada, *Wireless Telecommunications Sector: Status Update and Implications*, 10 December 2012 [ATI Document], Slide 3. That Canada would seek to encourage participation and bidding in its auction is uncontroversial. *See, e.g.*, **Exhibit C-224**, Industry Canada, *Advice to the Minister: Key proposals for the AWS-3 Spectrum Auction Consultation*, 7 July 2014, *with* Annexes [ATI Document], Annex A, p. 5 ("*A key goal is to encourage competition and to stimulate participation in the auction for the set-aside spectrum*.").

aside—*i.e.*, by purchasing set-aside spectrum licenses at the Auction only to sell the spectrum licenses to an Incumbent at a premium shortly thereafter—which included:

(a) **A five-year restriction on the transfer of set-aside spectrum licenses to an Incumbent**: Canada understood that this five-year period was long enough to deter hoarding of unutilized spectrum by New Entrants, but short enough to afford New Entrant investors a viable exit strategy for value should the Canadian market prove unable, or unwilling, to economically sustain the New Entrants. Canada understood that an indefinite restriction on the transfer of set-aside spectrum licenses to an Incumbent could deter potential New Entrants from making the decision to invest. Canada understood that it could not guarantee the success of any New Entrant, and recognized that meant there might be no New Entrants remaining in the market after five years.[74]

(b) **Certain minimum rollout targets within the first five years**: To ensure that spectrum was used and to deter spectrum hoarding, Canada set targets to be met in the first five years which would be considered a factor in any license renewal application as well as in any application from a New Entrant for extension of in-territory roaming.[75]

42. This package of conditions offered to potential investors was repeated in Canada's key policy documents relating to the 2008 AWS Auction (discussed in detail below), and caused GTH and other prospective investors to see this as a unique opportunity to enter into a growing, yet under-penetrated market, whose consumers were demanding a broader offering of services at lower cost.[76] Industry commentators concurred, and described that this was an unprecedented opportunity for New Entrants to enter the Canadian wireless telecommunications market and to have a fair chance at establishing a viable business.[77]

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[74] *See* **Exhibit C-004**, AWS Auction Policy Framework, p. 6; **CWS-Connolly**, ¶ 13.

[75] *See* **Exhibit C-004**, AWS Auction Policy Framework, pp. 8, 10.

[76] *See infra* Part IV.C.

[77] *See infra* Part IV.C.

Accordingly, the conditions contained in this framework were key to GTH's decision to invest in Canada.[78]

43. Below, GTH describes the policies and laws which comprise the 2008 AWS Auction Framework and the key terms arising from each.

1. The Terms Of The AWS Auction Consultation

44. In February 2007, Industry Canada announced the consultation procedure for its upcoming auction of AWS spectrum licenses ("**AWS Auction Consultation**").[79] In this consultation document, Industry Canada emphasized its overarching objective to "*Foster*[] *a Competitive Wireless Market*."[80] In particular, Canada cited:

(a) The policy objectives outlined in Section 7 of the Telecommunications Act including its directive "*to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications*" and "*to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective*";[81]

(b) The recommendations made by the Telecommunications Policy Review Panel ("**TPRP**")[82] in its 22 March 2006 report ("**TPRP Report**"), including that there should be "*reliance on market-based approaches to spectrum management as much as possible*" in addition to the "*continued use of regulatory mechanisms such as spectrum caps (spectrum aggregation limits) where spectrum is scarce in order to*

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78 *See infra* Part IV.C.

79 **Exhibit C-050**, AWS Auction Consultation.

80 **Exhibit C-050**, AWS Auction Consultation, Part II, § 2.

81 **Exhibit C-050**, AWS Auction Consultation, Part II, § 2.1.

82 The TPRP was an expert panel commissioned by Canada and "*appointed to review Canada's telecommunications policy framework and recommend on how to modernize it to ensure that Canada has a strong, internationally competitive telecommunications industry that delivers world-class services for the economic and social benefit of all Canadians*." **Exhibit C-045**, Industry Canada, *Telecommunications Policy Review Panel: Final Report*, March 2006 (hereinafter "**TPRP Report**"), Cover Letter.

provide an opportunity for new entrants to acquire spectrum and for Canadians to have an expanded choice of service providers";[83] and

(c) The "*two guiding principles*" identified in the "*Framework for Spectrum Auctions in Canada*" from October 2001, which included (*i*) restricting certain entities currently providing telecommunications services from holding certain licenses if, for example, "*that entity possesses significant market power in the supply of one or more telecommunications services in a region covered by the licence to be auctioned*"; and (*ii*) applying spectrum aggregation limits which would limit the amount of spectrum licenses a single bidder would be allowed to acquire during the auction.[84]

45. While it sought to encourage new market entry, Canada recognized that there were several substantial obstacles to achieve this objective. Canada outlined the following "*Barriers to Market Entry*":

> ***2.5 Barriers to Market Entry***
>
> *New facilities-based wireless operators have several barriers to market entry. Spectrum is a finite resource that can only be accessed periodically subject to changes in international and national allocation plans and technical standards. Network investments are characterized with risk, as the high capital investments necessary to fund the extensive and location-specific mobile networks may lead to long payback periods and technological obsolescence with the possibility of stranded assets. Furthermore, incumbents typically control many of the existing facilities, including access rights, tower sites, rights of way, customer premises, spectrum and interconnection arrangements. The high fixed cost of building a wireless network presents challenges for facilities-based entrants seeking to replicate it. Further, the economies of scale that a wireless incumbent enjoys, may prevent a competitive entrant from being able to match the incumbent's incremental costs of serving each additional subscriber. Consequently, new entrants must have sufficient access to capital to compete in a capital-intensive industry where the most lucrative customers demand wide-area or nationwide service. The wireless industry*

[83] **Exhibit C-050**, AWS Auction Consultation, Part II, § 2.2; **Exhibit C-045**, TPRP Report, Section 12-12, Recommendation 5-9.

[84] **Exhibit C-050**, AWS Auction Consultation, Part II, § 2.3; **Exhibit C-041**, 2001 Spectrum Auction Framework, § 2.1.

> *must also consider the balance between innovation and the risk of obsolescence for existing assets.*
>
> ***2.5.1 Foreign Investment Restrictions***
>
> *Canadian ownership and control requirements impose certain restrictions on foreign investment in facilities-based telecommunications carriers in Canada including wireless carriers. The spectrum considered in this consultation process will eventually be licensed under the Radiocommunication Act subject to Canadian ownership and control requirements and therefore subject to foreign investment restrictions. Foreign investment restrictions have the effect of limiting potential entry in the telecommunications market thereby reducing the competitive discipline that the threat of entry can provide. It is important to consider the effect this may have on the free operation of the market and the ability to rely solely on market forces in the forthcoming auction.*[85]

46. Canada further recognized that "[t]*he unavailability of spectrum also constitutes a barrier to market entry*."[86] It observed that the benefits of measures like spectrum aggregation limits or set-asides would be to "*reduce the exclusive reliance on* ex post *regulation to address competition issues*" and to assuage the risk that Incumbents would purchase all of the spectrum licenses made available at auction.[87] On the other hand, such measures presented their own counter-vailing risk: namely, "*unviable*" or "*uneconomic*" entry by New Entrants who would not be able to compete.[88] However this risk, Canada contended, "***can be corrected by market forces should a new entrant fail***."[89] Canada was aware that

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[85] **Exhibit C-050**, AWS Auction Consultation, Part II, § 2.5.

[86] **Exhibit C-050**, AWS Auction Consultation, Part II, § 2.7.

[87] **Exhibit C-050**, AWS Auction Consultation, Part II, § 2.7. Canada further observed that in other countries, such *ex post* solutions to wireless competition presented a number of difficulties. *See* **Exhibit C-050**, AWS Auction Consultation, Part II, § 2.7.

[88] **Exhibit C-050**, AWS Auction Consultation, Part II, § 2.7 ("*Potential adverse impact (i.e. unviable entry) can be corrected by market forces should a new entrant fail . . . Not taking explicit action to enable entry may therefore have the consequence of preventing entry while taking explicit action runs the risk of potentially enabling uneconomic entry.*").

[89] **Exhibit C-050**, AWS Auction Consultation, Part II, § 2.7 (emphasis added).

once market forces were permitted to resume after the Five-Year Rollout Period, it was possible that the Incumbents would simply buy the New Entrants.[90]

47. Canada further emphasized the importance of roaming for both consumers and New Entrants, noting "*that new entrants are at a competitive disadvantage with regard to incumbent wireless carriers if their customers have no ability to roam onto other networks*."[91]

48. With respect to the ability to transfer and sell spectrum licenses purchased through the AWS Auction, Canada contemplated only that "[l]*icences will be transferable and divisible in the secondary market*,"[92] adding that "[a]*n effective market calls for the reduction of barriers to entry and a productive secondary market*."[93]

49. On the basis of the above, Canada sought comments from the industry on topics including the following:

(a) Whether measures to enable market entry in the 2008 AWS Auction were necessary and, if yes, whether this should be achieved by setting aside spectrum or spectrum aggregation limits on auctioned spectrum licenses;[94]

(b) How Canada should implement any set-aside "*post auction*" and the specific duration of any set-aside license conditions that might affect the licenses divisibility and transferability;[95]

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90 *See* **CWS-Connolly**, ¶¶ 13, 15.

91 **Exhibit C-050**, AWS Auction Consultation, Part II, § 3.

92 **Exhibit C-050**, AWS Auction Consultation, Part II, § 5.1.

93 **Exhibit C-050**, AWS Auction Consultation, Part II, § 5.3.

94 **Exhibit C-050**, AWS Auction Consultation, Part II, §§ 2.7, 2.7.1-2.7.2.

95 **Exhibit C-050**, AWS Auction Consultation, Part II, § 2.7.1.

(c) The extent to which lack of mandated roaming could be a barrier to entry into the wireless market, and whether to mandate Incumbents to offer roaming, and what mechanisms should be put in place to achieve the policy objectives with respect to roaming;[96] and

(d) The proposed conditions of license for AWS spectrum.[97]

2. The Terms Of The Spectrum Policy Framework

50. Four months after it initiated the consultation procedure for the 2008 AWS Auction, in June 2007 Industry Canada released its new "*Spectrum Policy Framework for Canada*" ("**Spectrum Policy Framework**"), updating the version of the framework last revised in 2002.[98]

51. The Spectrum Policy Framework established the general "*policy foundation for the Canadian Spectrum Management Program*,"[99] *i.e.*, the overarching policy and conditions applicable to all wireless spectrum licenses, including AWS spectrum licenses, and incorporated over eighteen months of public consultation and discussion.[100] It was developed in response to the TPRP Report and the Minister of Industry and Governor in Council's directives to rely on market forces to the maximum extent feasible and to regulate only when necessary.[101]

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96 **Exhibit C-050**, AWS Auction Consultation, Part II, § 3.

97 **Exhibit C-050**, AWS Auction Consultation, Part II, § 5.4.

98 **Exhibit C-052**, Spectrum Policy Framework. *See also* **CWS-Connolly**, ¶ 10.

99 **Exhibit C-052**, Spectrum Policy Framework, Executive Summary, p. 1.

100 **Exhibit C-052**, Spectrum Policy Framework, Executive Summary, pp. iii, 1-3.

101 **Exhibit C-052**, Spectrum Policy Framework, Executive Summary, p. iii.

52. Canada's new Spectrum Policy Framework recognized the "*common finding*" of "*the benefit of moving from a prescriptive form of spectrum management to one that embraces more flexibility and a greater reliance on market forces, particularly with respect to spectrum used for commercial purposes*."[102] In this Spectrum Policy Framework, Canada adopted a policy objective "[t]*o maximize the economic and social benefits that Canadians derive from the use of the radio frequency spectrum resource*."[103] To achieve this policy objective, Canada "*recognized the importance of setting out clear guidelines toward achieving the policy objective and directing the operation of the Program*."[104] Consequently, it adopted several "*enabling guidelines*" which acknowledged the importance of relying on market forces, including the facilitation of secondary markets for spectrum authorizations.[105] Among the guidelines set out in this document, Canada included the following:

> *(a) Market forces should be relied upon to the maximum extent feasible. . . .*
>
> *(d) Regulatory measures, where required, should be minimally intrusive, efficient and effective.*
>
> *(e) Regulation should be open, transparent and reasoned, and developed through public consultation, where appropriate. . . .*
>
> *(h) Spectrum policy and management should support the efficient functioning of markets by:*

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[102] **Exhibit C-052**, Spectrum Policy Framework, § 2. *See also* **Exhibit C-052**, Spectrum Policy Framework, §§ 3.3-3.6 ("*The Framework reflects the Department's evolution toward more market-based policies and regulation where appropriate, and the government's recently stated commitment to this approach*."); **Exhibit C-245**, Maxime Bernier, *Spectrum: a crucial element for the telecom industry*, 11 May 2016, http://www.maximebernier.com/blog_spectrum_a_crucial_element_for_the_telecom_industry (last visited 24 September 2017) (publishing speech given to the Canadian Telecom Summit on 13 June 2007).

[103] **Exhibit C-052**, Spectrum Policy Framework, § 4.3.

[104] **Exhibit C-052**, Spectrum Policy Framework, § 4.4.

[105] **Exhibit C-052**, Spectrum Policy Framework, § 4.4.

- *permitting the flexible use of spectrum to the extent possible; . . .*
- *facilitating secondary markets for spectrum authorizations;*
- *clearly defining the obligations and privileges conveyed in spectrum authorizations; . . .*[106]

53. The Spectrum Policy Framework was therefore consistent with an overarching movement to rely on market forces to the maximum extent feasible, and reflected the prevailing spectrum management policy at this time.

3. The Terms Of The Spectrum Licensing Procedure

54. Following the issuance of the Spectrum Policy Framework, Industry Canada released its general "*Licensing Procedure for Spectrum Licenses for Terrestrial Services*" ("**Spectrum Licensing Procedure**"), which described the basic principles governing the licensing of spectrum and the procedures to be followed when dealing with Industry Canada.[107]

55. Importantly, the Licensing Procedure identified Industry Canada's guiding principles on "*Transfer and Divisibility of Spectrum Licenses*."[108] Canada observed that spectrum licenses assigned under different processes (*e.g.*, "*first-come, first-served*" versus auction) may not have the same privileges.[109] By way of example, Canada explained that one privilege enjoyed by spectrum licenses assigned through an auction process (*i.e.*, like the upcoming AWS auction) is the privilege of "*enhanced transferability and divisibility*

[106] **Exhibit C-052**, Spectrum Policy Framework, § 4.4.

[107] **Exhibit C-003**, Spectrum Licensing Procedure, Preface, p. ii.

[108] **Exhibit C-003**, Spectrum Licensing Procedure, § 5.6.

[109] **Exhibit C-003**, Spectrum Licensing Procedure, § 5.6.

rights."[110] In Canada's words, this meant that "[t]*hese spectrum licenses 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 license and other applicable regulatory requirements*."[111] As Canada described in its first Spectrum Auction Framework released in 1998, "[b]*y allowing licences to be bought and sold after an auction, a firm with a more valuable new use of the spectrum can negotiate a transfer with the incumbent licensee that is beneficial not only to both parties, but also to consumers*."[112]

56. Canada continued by identifying the "*conditions and guidelines*" applicable to the transfer of spectrum. These conditions and guidelines can be summarized as follows: (*i*) the conditions that applied to the license would continue to be applicable when the license is transferred, including with respect to the license's term and renewal; (*ii*) the party to whom the license was transferred must meet the eligibility criteria outlined in the Radiocommunication Regulations (discussed further at Part III.B.7 below); and (*iii*) all proposed license transfers must comply with existing policies.[113]

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[110] **Exhibit C-003**, Spectrum Licensing Procedure, § 5.6.

[111] **Exhibit C-003**, Spectrum Licensing Procedure, § 5.6. *See also* **Exhibit C-038**, 1998 Spectrum Auction Framework, Framework Summary ("*Licensees will be allowed to transfer and subdivide their licences to eligible third parties*."); **Exhibit C-041**, 2001 Spectrum Auction Framework, Framework Summary ("*Licensees will be allowed to transfer their licences in whole or in part (in both bandwidth and geographic dimensions) to eligible third parties.*"); **Exhibit C-039**, Industry Canada, *Policy and Licensing Procedure for the Auction of Additional PCS Spectrum in the 2 GHz Frequency Range*, 28 June 2000, p. ii.

[112] **Exhibit C-038**, 1998 Spectrum Auction Framework, § 6.3.

[113] **Exhibit C-003**, Spectrum Licensing Procedure, § 5.6.

4. The Terms Of The AWS Auction Policy Framework

57. In November 2007, nine months after the initiation of the consultation process with the AWS Auction Consultation and following the release of the Spectrum Policy Framework and Spectrum Licensing Procedure, Canada released the "*Policy Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range*" ("**AWS Auction Policy Framework**").[114] In this document, Canada "*provide*[d] *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)*."[115]

58. In this AWS Auction Policy Framework, Canada once again expressed its commitment to government policies which seek to rely on market forces to the maximum extent feasible for the provision of telecommunications services.[116] Notwithstanding this commitment, Canada again emphasized that reliance on market forces alone would not achieve its objective to enable market entry to increase competition in the Canadian market, concluding that "*policy measures which seek to foster facilities-based wireless competition are consistent with the government's policy to rely on market forces to the maximum extent feasible*."[117]

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[114] **Exhibit C-004**, AWS Auction Policy Framework.

[115] **Exhibit C-004**, AWS Auction Policy Framework, p. 1.

[116] **Exhibit C-004**, AWS Auction Policy Framework, p. 2 ("*The department is committed to government policies which seek to rely on market forces to the maximum extent feasible for the provision of telecommunications 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. Accordingly, in making this resource available, a critical consideration has been to implement an auction framework that will help ensure that market forces support a telecommunications infrastructure that delivers innovation and consumer choice at competitive prices*.").

[117] **Exhibit C-004**, AWS Auction Policy Framework, p. 4.

59. Acknowledging that Incumbents have an incentive to pay a premium for spectrum to prevent market entry in an auction process,[118] Canada stated that "*notwithstanding that wireless markets in Canada are competitive at this time, market conditions are such that establishing measures for the auction for AWS spectrum licences* ***to sustain and enhance competition*** *is warranted*."[119] It added that these measures "***are intended to ensure an opportunity for entry by addressing the potential to exploit spectrum as an entry barrier***."[120] Canada emphasized that it was "*cognizant of its policy to ensure that regulation* ***is proportionate to its purpose and interferes with market forces only to the extent necessary to achieve the intended objective***."[121]

60. On the basis of the above considerations, Canada memorialized measures in five areas relevant to this dispute:

(a) **Set-aside spectrum**: Canada set-aside forty MHz of AWS spectrum in certain frequency blocks for New Entrants only.[122] New Entrants were defined as "[a]*n entity, including affiliates and associated entities, which holds less than 10 percent of the national wireless market based on revenue*."[123]

(b) **Five-year restriction on transfer of set-aside spectrum licenses**: In its decision describing the set-aside, Canada set one key condition: "*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*."[124]

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118 **Exhibit C-004**, AWS Auction Policy Framework, p. 3.

119 **Exhibit C-004**, AWS Auction Policy Framework, p. 4 (emphasis added).

120 **Exhibit C-004**, AWS Auction Policy Framework, p. 4 (emphasis added).

121 **Exhibit C-004**, AWS Auction Policy Framework, p. 4 (emphasis added).

122 **Exhibit C-004**, AWS Auction Policy Framework, p. 5.

123 **Exhibit C-004**, AWS Auction Policy Framework, p. 5.

124 **Exhibit C-004**, AWS Auction Policy Framework, p. 6.

In this provision, Canada adopted a proposal[125] first raised by Quebecor Media Inc. ("**QMI**") during the consultation phase to impose a limited five-year restriction on the licensee's ability to transfer set-aside spectrum to a company that does not meet the criteria of a New Entrant.[126] The purpose of such a restriction, coupled with the rollout obligations discussed below, was to ensure that spectrum was "*rapidly and effectively used by new entrants*," and prevent insincere participation by New Entrants who might purchase set-aside spectrum only to profit immediately from its sale at a higher price (likely to an Incumbent).[127] In Canada's words, "[t]*his condition was aimed at avoiding circumvention of the set-aside and was consistent with the legislative objectives of achieving reliable and affordable telecommunications services and enhanced competitiveness*."[128] While a

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[125] **Exhibit C-244**, *Quadrangle Group LLC, QCP W S.A.R.L., and Data & Audio-Visual Enterprises Investments Inc. v. Attorney General of Canada*, Ontario Superior Court of Justice, Court File No. CV-15-10824-00CL, Statement of Defence, 18 December 2015 (hereinafter "**Mobilicity Litigation – Statement of Defence**"), ¶¶ 49 ("*As for a moratorium on transfers of licences set-aside for new entrants to large wireless service providers, this measure was not included in the* Auction Consultation Paper. *Rather, it was proposed by Québecor in May 2007 in its submissions*" (emphasis in original)), 61 (confirming that this moratorium "*was proposed by Québecor in May 2007*").

[126] **Exhibit C-051**, Quebecor Media Inc., *Submission by Quebecor Media Inc. To Industry Canada in Response to Canada Gazette Notice DGTP-002-07, "*Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services,*"* 25 May 2007 (hereinafter "**QMI Submission**"), pp. 16-17 (identify one "*critical requirement*[]" as "[r]*estrictions imposed on holders of set aside spectrum regarding the transfer to or acquisition of the totality or of a portion of their licenses by existing incumbent mobile carriers for a period of five years*" and that this requirement will "*ensure that spectrum is rapidly and effectively used by new entrants*").

[127] **Exhibit C-051**, QMI Submission, p. 17. *See also* **Exhibit C-054**, Data & Audio-Visual Enterprises Inc., *Reply to Submissions Filed with Respect to DGTP-002-07, Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services*, 27 June 2007 (hereinafter "**DAVE Reply**"), p. 7 ("*The majority of respondents differed from ourselves with respect to license divisibility and transferability. Most respondents felt there should be some form of restriction on spectrum acquired as part of a set aside. These restrictions were meant to prevent license flipping or auction profiteering. The suggestions on how to implement the restrictions varied from not allowing any division or transferability to division and transferability to other new entrants only. The most balanced view appeared to come from Quebecor Media's submission whereby set aside spectrum could not be transferred to existing incumbents for 5 years. While there was no clear consensus on how to best implement such restrictions, DAVE supports restrictions on divisibility and transferability of licenses to existing incumbents but only for a limited period of time.*"); **Exhibit C-053**, Niagara Networks Incorporated, *Reply Comments – Canada Gazette Notice DGTP-002-07, "Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services,"* 26 June 2007 (hereinafter "**Niagara Networks Reply**"), pp. 47-48 ("*The possibility of a new entrant potentially speculating and bidding on spectrum for the purpose of flipping the license post auction appears to be of great concern for the incumbents. With that in mind we wish to reverse our position from our May 25th submission with respect to 'transferability' of the license. We now wish to submit that the licenses acquired in the AWS auction should not be transferable for a period of 3 years following the auction process in order to alleviate any concern over potential speculation by a new entrant participant*.").

[128] **Canada's Request for Bifurcation**, ¶ 9.

submission from another industry participant proposed an indefinite prohibition on transfer,[129] Canada chose to limit this period to five years.[130]

(c) **Rollout obligations**: Canada set certain minimum rollout targets to be achieved within five years, which would satisfy the dual goal to promote use of spectrum and to deter investors from accessing spectrum for speculation without use or spectrum warehousing.[131] Any failure to meet these five-year rollout targets would be taken into account in Canada's decision whether or not to renew the relevant AWS license as well as any application from a New Entrant for extension of in-territory roaming beyond the initial five year term (discussed below).[132]

(d) **Mandatory roaming**: Concluding that "*mandated roaming is important to promote competition*," Canada determined that Incumbents would be required to provide to all cellular, PCS and AWS licensees roaming outside of a licensee's territory for at least the 10-year term of the AWS license, as well as roaming within a New Entrant's licensed areas for five years while the licensee built out its network.[133] Canada stated that roaming must "*be made available at commercial rates*," describing commercial rates as rates "***that are reasonably comparable to rates that are currently charged to others for similar services***."[134] Canada stated that roaming arrangements must be offered "*wherever technically feasible, negotiated expeditiously* [with set time limits] *and in good faith*."[135] Canada added that "[s]*hould the parties be unable to come to an agreement within the established time frame, the parties will be required to undertake binding arbitration*."[136] With the above in mind, Canada explained that the specific policies, procedures, and time

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[129] *See* **Exhibit C-055**, Cybersurf Corp., *Consultation on a Framework to Auction Spectrum in the 2 GHz Range including Advanced Wireless Services, Reply Comments of Cybersurf Corp.*, 27 June 2007 (hereinafter "**Cybersurf Reply**"), ¶¶ 11-12 ("*In order for the licensing of spectrum allocated through set-asides to continue promoting the pro-competitive objectives of a set-aside policy, a condition of licence should exist that prevents the spectrum in question from falling into the hands of incumbent mobile wireless carriers or their affiliates even in cases of the division and/or transfer of such spectrum. In other words, in order to promote a pro-competitive policy that could be defeated or diminished if spectrum aggregation occurs over time after the completion of the auction,* ***set-asides should continue for an indeterminate period****. Additional consultation by the Department should take place before any set-asides are reduced or eliminated, should that ever be contemplated*." (emphasis added)).

[130] *See* **CWS-Connolly**, ¶ 13.

[131] **Exhibit C-004**, AWS Auction Policy Framework, p. 10.

[132] **Exhibit C-004**, AWS Auction Policy Framework, p. 10.

[133] **Exhibit C-004**, AWS Auction Policy Framework, p. 8.

[134] **Exhibit C-004**, AWS Auction Policy Framework, pp. 8-9 (emphasis in original).

[135] **Exhibit C-004**, AWS Auction Policy Framework, p. 8.

[136] **Exhibit C-004**, AWS Auction Policy Framework, p. 8.

frames to implement mandatory roaming would be released at a later date (discussed further below).[137]

(e) **Mandatory tower and site-sharing**: Canada recognized both the economic and social concern relating to the proliferation of antenna towers, as well as the submissions made by New Entrants and industry commentators that access to suitable and existing sites was a barrier to entry.[138] In particular, New Entrants observed "*that they cannot gain ready access to new antenna sites and that rates charged are artificially high so as to preclude new entrant access*."[139] On this basis, Canada determined that it would mandate antenna tower and site sharing, prohibit exclusive site arrangements for all licensees, and direct licensees to binding arbitration to resolve disputes if agreements are not finalized.[140] Similar to the mandatory roaming decision, Canada confirmed that the specific policies, procedures, and time frames to implement tower and site sharing would be released at a later date (discussed further below).[141]

61. As mentioned above, the five-year period in which set-aside licenses could not be transferred (measure (b)), the five years to reach the rollout requirements (measure (c)), and the five years pursuant to which in-territory roaming would be mandated (measure (d)), comprised a Five-Year Rollout Period during which New Entrants were incentivized to utilize their spectrum and invest in and build out their networks. At the end of this period, the set-aside spectrum licenses were transferable to an Incumbent in accordance with the principle of "*enhanced transferability*" enshrined in the Spectrum Licensing Procedure.[142]

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[137] **Exhibit C-004**, AWS Auction Policy Framework, p. 9.

[138] **Exhibit C-004**, AWS Auction Policy Framework, p. 9.

[139] **Exhibit C-004**, AWS Auction Policy Framework, p. 9.

[140] **Exhibit C-004**, AWS Auction Policy Framework, p. 9.

[141] **Exhibit C-004**, AWS Auction Policy Framework, p. 9.

[142] *See* **CWS-Connolly**, ¶¶ 10, 13; **Exhibit C-003**, Spectrum Licensing Procedure, § 5.6.

62. In addition to the above, Canada noted that restrictions on foreign ownership of wireless facilities-based carriers "*act as restrictions on foreign investment which constitutes a barrier to market entry*."[143] It explained, however, that at the time of this policy issuance, "[t]*he question of foreign ownership restrictions is being studied by the Competition Policy Review Panel*," and the "[r]*emoval or liberalization of these requirements would require legislative changes*."[144]

5. The Terms Of The AWS Auction Licensing Framework

63. A month later, in December 2007, Canada released its "*Licensing Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range*" ("**AWS Auction Licensing Framework**"), which initiated the licensing process by outlining the rules and requirements for the competitive bidding process, and calling for application forms and financial deposits.[145] The Licensing Framework once again described the following features of the 2008 AWS Auction and the set-aside licenses issued in that auction:

(a) "*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*."[146]

(b) Industry Canada would take into account whether a New Entrant met its rollout targets both in considering the eventual renewal of AWS licenses and an application

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143 **Exhibit C-004**, AWS Auction Policy Framework, p. 3.

144 **Exhibit C-004**, AWS Auction Policy Framework, p. 3.

145 **Exhibit C-005**, Industry Canada, *Licensing Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range (DGRB-011-07)*, December 2007 (hereinafter "**AWS Auction Licensing Framework**").

146 **Exhibit C-005**, AWS Auction Licensing Framework, § 4.2.

from a national New Entrant for extension of in-territory roaming beyond five years.[147]

(c) The final conditions of license relating to mandated roaming and antenna tower and site sharing would be released in early 2008.[148]

6. The Mandatory Roaming & Tower/Site Sharing Policies

64. As referenced above, in parallel with its release of the AWS Auction Policy Framework, Canada initiated a consultation proceeding on proposed conditions of license "*to implement the policies of mandatory roaming and mandatory antenna tower and site sharing, including the prohibition of exclusive site arrangements*."[149] In this document, Canada reiterated the proposed conditions on mandatory roaming and mandatory tower and site sharing set out in the Auction Policy Framework.

65. On 29 February 2008, ten days prior the start of the 2008 AWS Auction, Canada released a notice detailing the results of the Consultation and identifying the final "*Conditions of Licence for Mandatory Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements*" ("**Mandatory Roaming & Tower/Site Sharing Notice**").[150] In this Notice, Canada memorialized several policy objectives motivating these conditions of license. It described the two "*drivers*" for the new proposed license conditions as

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147 **Exhibit C-005**, AWS Auction Licensing Framework, § 4.11.

148 **Exhibit C-005**, AWS Auction Licensing Framework, § 4.13.

149 **Exhibit C-060**, Industry Canada, *Notice No. DGRB-010-07 – Consultation on Proposed Conditions of Licence to Mandate Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements*, November 2007, https://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf08834.html (last visited 24 September 2017), pp. 1-2.

150 **Exhibit C-067**, Industry Canada, *Notice No. DGRB-002-08 – Conditions of Licence for Mandatory Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements*, 29 February 2008 (hereinafter "**Mandatory Roaming & Tower/Site Sharing Notice**").

"*limit*[ing] *the social impacts of a proliferation of new towers and . . .* ***facilitat*[ing] *new competitive entry into the provision of wireless services***."[151] With respect to mandatory roaming, Canada stated that "[t]*he intent of the policy is to encourage the deployment of advanced networks that provide the greatest choice of basic and advanced services available at competitive prices to the greatest number of Canadians*."[152]

66. Among the final conditions of license, Canada included the following:

(a) **Mandatory antenna tower and site sharing**:

> *1. The Licensee must facilitate sharing of antenna towers and sites . . . and not cause or contribute to the exclusion of other radiocommunication carriers from gaining access to Sites.*
>
> *2. The Licensee must share its Sites . . . where technically feasible, when requested to do so . . .*
>
> *Industry Canada expects that Site-Sharing Agreements . . . will be offered at commercial rates that are reasonably comparable to rates currently charged to others for similar access. . . .*
>
> *6. Licensees must negotiate with a Requesting Operator in good faith with a view to concluding a Site-Sharing Agreement in a timely manner.*[153]

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[151] **Exhibit C-067**, Mandatory Roaming & Tower/Site Sharing Notice, § 1 (emphasis added). *See also* **Exhibit C-007**, Industry Canada, *Conditions of Licence for Mandatory Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements (CPC-2-0-17, Issue 1)*, November 2008 (hereinafter "**Mandatory Roaming & Tower/Site Sharing COL**"), § 1.1.

[152] **Exhibit C-067**, Mandatory Roaming & Tower/Site Sharing Notice, § 2. *See also* **Exhibit C-007**, Mandatory Roaming & Tower/Site Sharing COL, § 2.1.

[153] **Exhibit C-067**, Mandatory Roaming & Tower/Site Sharing Notice, §§ 8.1, 8.2, 8.4(a), 8.6. *See also* **Exhibit C-007**, Mandatory Roaming & Tower/Site Sharing COL, §§ 8.1, 8.2, 8.4(a), 8.6.

(b) **Mandatory roaming**:

> *1. The Licensee must provide automatic digital roaming (roaming) by way of Roaming Agreements, on its cellular, PCS and AWS networks to any of the parties defined below . . .*
>
> > *(a) To all cellular, PCS and AWS licensees outside of their licensed area, for at least the 10-year term of the AWS licences. . . .*
> >
> > *(b) To all new entrants, in their licensed areas for a period of five years commencing with the date of issuance of their licence;*
> >
> > *(c) To national new entrants who have substantially met the five-year roll-out requirements outlined on their licence, as determined by Industry Canada, for an additional five years; and*
> >
> > *(d) To a party who is a provisional licence winner following the Auction for Spectrum Licences or Advanced Wireless Services and other Spectrum in the 2 GHz Range and who will meet one of the criteria set out in subsection (a) or (b) above. . . .*
>
> *Industry Canada expects that Roaming Agreements will be offered at commercial rates that are reasonably comparable to rates currently charged to others for similar roaming services . . .*
>
> *6. Licensees must negotiate with a Requesting Operator in good faith, with a view to concluding a Roaming Agreement in a timely manner.*[154]

67. In the event that a Site-Sharing Agreement or a Roaming Agreement could not be negotiated within 90 days after the initial request, Canada required that the parties submit to a binding arbitration mechanism to resolve the dispute.[155] While the precise arbitration rules were not yet defined at the start of the 2008 AWS Auction (as noted below, the rules

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[154] **Exhibit C-067**, Mandatory Roaming & Tower/Site Sharing Notice, §§ 9.1, 9.4(a), 9.6. *See also* **Exhibit C-007**, Mandatory Roaming & Tower/Site Sharing COL, §§ 9.1, 9.4(a), 9.6.

[155] **Exhibit C-067**, Mandatory Roaming & Tower/Site Sharing Notice, §§ 8.7, 9.7. *See also* **Exhibit C-007**, Mandatory Roaming & Tower/Site Sharing COL, §§ 8.7, 9.7.

were released in November 2008), Canada set out certain "*characteristics*" that it expected the arbitration process to include (for example, "*rigorous timelines*").[156]

68. Separately, in the lead up to the 10 March 2008 deadline to apply for the 2008 AWS Auction, Canada released a series of responses to questions submitted from third parties on the Auction's conditions and procedures.[157] In its responses, Canada provided further information on mandatory roaming and tower and site sharing, explaining the following:

> ***2.14 In response to questions on penalties for unnecessarily delaying the roaming requests.***
>
> *. . . Parties who do not follow established time frames or who foster delay and fail to negotiate in good faith may be subject to proceedings based on a breach of conditions of licence. Industry Canada would consider appropriate action at that time based on the circumstances. . . .*
>
> ***3.1 In response to questions seeking clarification on the policy as it relates to Industry Canada's jurisdiction over antenna tower and site sharing and to prohibit exclusive site arrangements.***
>
> *. . . Licensees who delay or who act in bad faith may be subject to proceedings based on a breach of their conditions of licence. . . .*
>
> ***3.4 In response to questions seeking clarification on the sharing process.***
>
> *. . . the proposed condition of licence to mandate sharing would ensure that sharing agreements are negotiated and finalized in an efficient manner, on the basis of reasonable commercial rates and with assistance from an arbitrator, if required.*[158]

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156 **Exhibit C-067**, Mandatory Roaming & Tower/Site Sharing Notice, § 7.

157 **Exhibit C-062**, Industry Canada, *Responses to Questions for Clarifications on the AWS Policy and Licensing Frameworks*, 27 February 2008 (hereinafter "**AWS Auction Responses to Questions**").

158 **Exhibit C-062**, AWS Auction Responses to Questions, pp. 14-16 (emphasis in original). *See also* **Exhibit C-093**, Industry Canada, *Guidelines for Compliance with the Conditions of Licence Relating to Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements (GL-06, Issue 1)*, April 2009, § 4 ("*Where a licensee is found to be in non-compliance with the conditions of licence for antenna tower and site sharing, the Department may consider the suspension or revocation, in whole or in part, of the Licensee's radio and/or spectrum licences associated with the site where the breach of licence occurred.*").

69. In November 2008, four months after the 2008 AWS Auction, Canada simultaneously released its Client Procedures Circulars ("**CPC**") setting out the "*Conditions of Licence for Mandatory Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements*" (which adopted the license conditions set out in the February Notice) and "*Industry Canada's Arbitration Rules and Procedures*" ("**Arbitration Rules & Procedures**").[159] The Arbitration Rules & Procedures identified the arbitration mechanism to be applied in the event that disputes arose during roaming and site-sharing negotiations.[160]

7. The Ownership & Control Rules

70. The 2008 AWS Auction was subject to Canada's O&C Rules. At that time, Section 10 of the Radiocommunications Regulations provided a stand-alone eligibility test for the issuance of radiocommunication carrier licenses (this includes spectrum licenses for wireless telecommunications common carriers). The test required that any radiocommunication common carrier (including any New Entrant) be "*Canadian-owned and controlled*," which was defined as follows:

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

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[159] *See* **Exhibit C-090**, Industry Canada, *Industry Canada's Arbitration Rules and Procedures (CPC-2-0-18, Issue 1)*, November 2008 (hereinafter "**Arbitration Rules & Procedures**"). CPCs "*describe the various procedures or processes to be followed by the public when dealing with Industry Canada*." *See* **Exhibit C-090**, Arbitration Rules & Procedures, Preface, p. 1.

[160] **Exhibit C-090**, Arbitration Rules & Procedures, § 2.1.

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

(c) the corporation is not otherwise controlled by persons who are not Canadians.[161]

71. In other words, a foreign investor like GTH could not own more than 20% of a radiocommunication common carrier's voting shares. Section 16 of the Telecommunications Act reflected the same limitation on a foreign investor's eligibility to operate as a telecommunications common carrier, articulating the same test.[162] In addition, the Canadian Telecommunications Common Carrier Ownership and Control Regulations provided that a foreign investor could not own more than 33 1/3% ownership of the voting shares of a holding company with a carrier company offering telecommunications in Canada.[163]

72. Thus, at the time of the 2008 AWS Auction, Industry Canada had the authority (pursuant to the Radiocommunication Regulations) to determine whether a foreign investor satisfied the O&C Rules, and the CRTC continued to have jurisdiction to review compliance under identical eligibility rules (pursuant to Section 16 of the Telecommunications Act). As described by Industry Canada in an internal draft presentation, this comprised "*duplicate oversight*":

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[161] **Exhibit C-001**, Radiocommunication Regulations, SOR/96-484, § 10(1).

[162] **Exhibit C-046**, Telecommunications Act, § 16(3).

[163] **Exhibit C-035**, Canadian Telecommunications Common Carrier Ownership and Control Regulations, SOR/94-667, § 2.

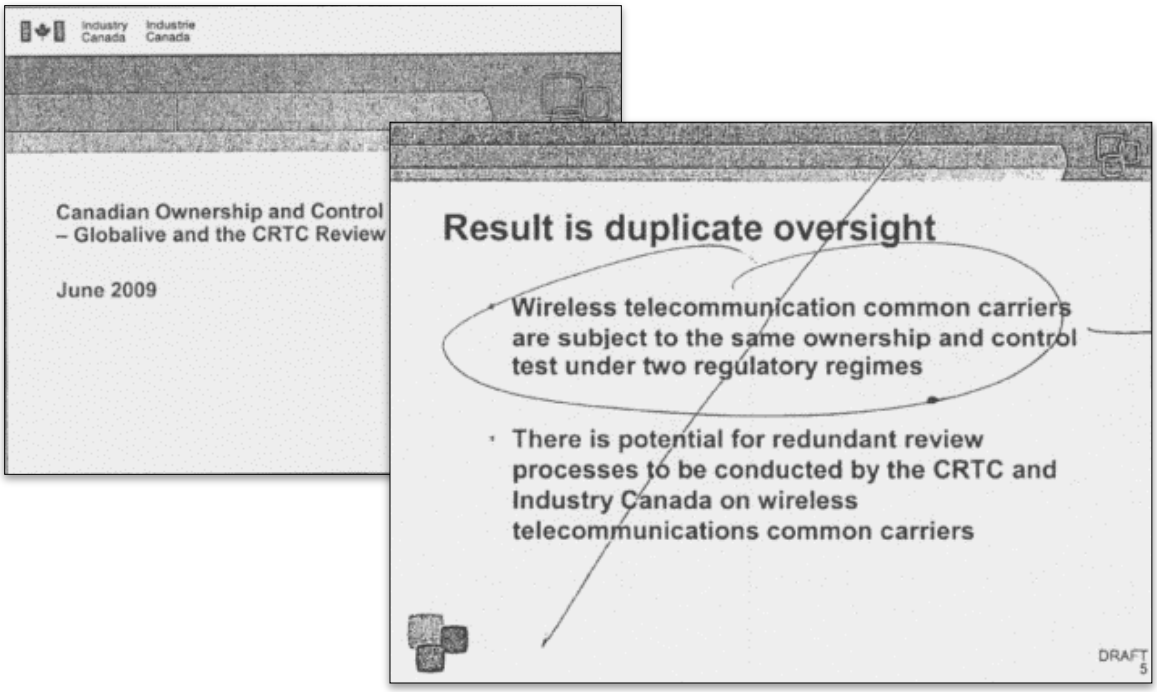

Figure 1: Slide 5 from an internal Industry Canada presentation entitled "*Canadian Ownership and Control – Globalive and the CRTC Review*." **Exhibit C-099**, Industry Canada, *Canadian Ownership and Control – Globalive and the CRTC Review* [ATI Document], June 2009, Slide 5.

73. At the time of the 2008 AWS Auction, both the Industry Canada and CRTC reviews were typically bi-lateral, confidential, and non-adversarial.[164] Government officials worked together with any foreign investor to try to agree a structure that met the requirements of the O&C Rules, and the non-public nature of the process prevented hostile third-party competitors from lobbying to keep out foreign competition.

[164] **Exhibit C-012**, CRTC, *Telecom Regulatory Policy CRTC 2009-428: Canadian ownership and control review policy*, ¶ 5 ("*In the past, the Commission has generally conducted ownership and control reviews on a confidential, bilateral basis, between the carrier under review and the Commission. This type of review has normally not resulted in a public record or the release of public reasons.*"); **CWS-Connolly**, ¶ 19 (noting that a "*public review process*" was not in Industry Canada's "*usual practice*").

74. In August 2007, Industry Canada updated its CPC advising on the procedures and processes to be followed on "*Canadian Ownership and Control*" ("**Ownership & Control CPC**").[165] In describing the elements Industry Canada would consider in determining whether a radiocommunication carrier satisfied the O&C Rules, Industry Canada explained that "[t]*he determination of the Canadian ownership and control is comprised of a number of objective elements*."[166] Appendix B of the CPC identified a list of information requested by Industry Canada to assist in its determination.[167]

75. While these were the legal conditions which existed at the time of GTH's participation in the 2008 AWS Auction, as detailed below in Part V.C.1.a, it was clear at the time of the 2008 AWS Auction that this restriction on foreign ownership was expected to be relaxed in the future.

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[165] **Exhibit C-058**, Industry Canada, *Canadian Ownership and Control (CPC-2-0-15, Issue 2)*, August 2007 (hereinafter "**Ownership & Control CPC**").

[166] **Exhibit C-058**, Ownership & Control CPC, § 6.

[167] **Exhibit C-058**, Ownership & Control CPC, Appendix B.

IV. GTH INVESTS IN CANADA IN RELIANCE ON THE 2008 AWS AUCTION FRAMEWORK

76. Relying on the above Framework created by Canada, including the policies and conditions described therein, in early 2008 GTH made its decision to invest in Canada and participate in the 2008 AWS Auction. Below, GTH details: (*i*) its decision to invest in Canada; (*ii*) the outcome of the 2008 AWS Auction and the revenues generated for Canada; (*iii*) the structure of GTH's investment in Wind Mobile; and (*iv*) a summary of GTH's expectations at the outset of its investment created on the basis of the 2008 AWS Auction Framework and corroborated by the views of Government officials and market participants.

A. Background To GTH's Decision To Invest In Wind Mobile

77. On 29 November 2007, Michael O'Connor, GTH's then Head of Business Development and Investments, received an email from Jim Bailey, a financial consultant based in Canada, forwarding a Reuters press report describing Canada's upcoming AWS auction.[168] The article noted Industry Canada's recent announcement that it would set aside spectrum in the upcoming auction for New Entrants only, and Minister of Industry Jim Prentice's declaration that the auction would be "*an opportunity to encourage new market entry*."[169]

78. Given the low penetration rates and substantial room for growth in the Canadian wireless telecommunications market, this auction offered an appealing new investment

[168] **Exhibit C-063**, Email from Mike O'Connor to Assaad Kairouz and Assaad Abousleiman, 27 February 2008, pp. 8-11.

[169] **Exhibit C-063**, Email from Mike O'Connor to Assaad Kairouz and Assaad Abousleiman, 27 February 2008, p. 9.

opportunity.[170] In December 2007 and January 2008, Mr. Bailey and Mr. O'Connor discussed the policy documents released by Canada, read press reports and market publications, and discussed the possibility of identifying a Canadian strategic and financial partner with whom GTH could pursue such an investment.[171]

79. In February 2008, GTH was in discussions with Globalive Communications Corp. ("**Globalive**"), a Canadian telecommunications provider with substantial experience providing telecommunications services in the Canadian market, who was seeking investors with whom it could partner to participate in the 2008 AWS Auction.[172]

80. While exploring the possibility of a joint venture with Globalive to participate in the 2008 AWS Auction, GTH reviewed the framework and terms for the 2008 AWS Auction, including the O&C Rules.[173] At this time, GTH was aware that there was a progressive movement towards the relaxation of the O&C Rules, which might allow GTH to take control of Wind Mobile in the future.[174] Globalive confirmed it was willing to agree to an investment structure that would allow for GTH to take control over its investment should

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[170] *See, e.g.*, **Exhibit C-066**, Email from Mike O'Connor to Assaad Kairouz, et al., 29 February 2008, *attaching* Globalive materials, pp. 13-54 (*Investor Presentation Globalive Wireless Partnership*, 26 February 2008, Slide 3), pp. 55-108 (*Globalive Wireless LP Private Placement Memorandum (v2)*, 15 February 2008, § 1.1); **Exhibit C-065**, Email from Mike O'Connor to Aldo Mareuse, et al., 28 February 2008 [redacted]

[171] **Exhibit C-063**, Email from Mike O'Connor to Assaad Kairouz and Assaad Abousleiman, 27 February 2008.

[172] **CWS-Dobbie**, ¶ 6; **Exhibit C-066**, Email from Mike O'Connor to Assaad Kairouz, et al., 29 February 2008, *attaching* Globalive materials.

[173] **CWS-Dobbie**, ¶¶ 7-11.

[174] **CWS-Dobbie**, ¶ 11.

the O&C Rules change.[175] As discussed below, this right for GTH to take voting control in the event the O&C Rules were relaxed was incorporated in Wind Mobile's corporate agreements,[176] and discussed with Canada at the time of Industry Canada's review of Wind Mobile's compliance with the O&C Rules (at which time Industry Canada did not raise any objections).[177]

81. While the 2008 AWS Auction was not scheduled to commence until 27 May 2008, potential investors had to apply to participate in the auction by 10 March 2008.[178] This application required an irrevocable standby letter of credit ("**LOC**") that would serve as a deposit in the auction.[179] [redacted] On 28 February 2008, members of GTH's Investment Committee agreed that the opportunity to invest in Canada looked promising, and authorized Mr. O'Connor to progress the exploration of a potential partnership with Globalive.[181]

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175 **CWS-Dobbie**, ¶ 11.

176 *See infra* Part IV.B.

177 *See infra* Part V.A.1. *See also* **Exhibit C-064**, Email from Mike O'Connor to Investment Committee, et al., 28 February 2008, *attaching* [redacted]

178 **Exhibit C-254**, Industry Canada, *Table of Key Dates Related to Licensing Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range*, http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf08840.html (last visited 24 September 2017).

179 *See* **Exhibit C-005**, AWS Auction Licensing Framework, § 5.4.1.

180 **Exhibit C-066**, Email from Mike O'Connor to Assaad Kairouz, et al., 29 February 2008, [redacted]

181 **Exhibit C-065**, Email from Mike O'Connor to Aldo Mareuse, et al., 28 February 2008 (describing that "*the OTH investment Committee . . . unanimously decided to enter the effort in an exploratory way*").

82. On 3 March 2008, the Investment Committee convened to discuss the opportunity in Canada and whether GTH should provide the LOC required by Globalive to participate in the Auction.[182] In advance of the call, members of the Investment Committee received materials describing Globalive's background and experience, key elements of the Canadian legal and regulatory framework including specific conditions relevant to the 2008 AWS Auction, and Globalive's proposed vehicle structure to pursue the investment.[183] The Investment Committee also received market materials describing the regulatory framework and important terms of the 2008 AWS Auction.[184] [redacted] regarding the structural requirements to comply with the O&C Rules.[187] On the basis of this information, the Investment Committee decided that GTH should continue its negotiations with Globalive [redacted]

[182] *See* **CWS-Dobbie**, ¶ 13.

[183] **Exhibit C-066**, Email from Mike O'Connor to Assaad Kairouz, et al., 29 February 2008, *attaching* Globalive materials. *See also* **CWS-Dobbie**, ¶ 13.

[184] *See, e.g.*, **Exhibit C-064**, Email from Mike O'Connor to Investment Committee, et al., 28 February 2008, [redacted] *See also* **CWS-Dobbie**, ¶ 13.

[185] **CWS-Dobbie**, ¶ 12.

[186] Now known as McMillan LLP.

[187] **CWS-Dobbie**, ¶ 11. For the avoidance of doubt, no privilege is waived with respect of the legal advice obtained from [redacted].

[188] *See* **CWS-Dobbie**, ¶ 13.

83. [redacted] Accordingly, on 10 March 2008, Globalive Wireless LP (*i.e.*, Wind Mobile) filed its application to participate in the 2008 AWS Auction and provided the required deposit in the form of two irrevocable standby letters of credit for a total of C$ 235,000,000, which included the LOC provided by GTH in the amount of C$ 220,000,000 and the LOC provided by Globalive in the amount of C$ 15,000,000.[190]

84. Industry Canada accepted this application, and for the two months that followed, GTH and its representatives progressed their due diligence efforts and concentrated on determining the commercial and technical aspects of a potential deal, including the business plan, technology requirements, auction bidding strategy, and deal structure.[191]

85. In May 2008, three weeks before the 2008 AWS Auction was scheduled to begin, the Investment Committee convened and reviewed a set of materials summarizing the conclusions from the due diligence process.[192] Following the review of the materials and

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189 [redacted]

190 **Exhibit C-069**, Globalive Wireless LP, *Application to Participate in the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2 GHz Range*, 10 March 2008 ; [redacted]

191 **Exhibit C-070**, Email from Mike O'Connor to Investment Committee, et al., 12 March 2008. *See also* **CWS-Dobbie**, ¶ 15.

192 **CWS-Dobbie**, ¶ 16.

the ensuing discussions, the Investment Committee made the decision to pursue the joint venture with Globalive to participate in the 2008 AWS Auction.[193]

86. When the 2008 AWS Auction began on 27 May 2008, Mr. O'Connor led the bidding efforts on behalf of Wind Mobile.[194] As Mr. Dobbie explains, the overarching strategy was to purchase sufficient spectrum licenses to establish a national network and therefore pose a credible threat to the Incumbents, while at the same time remaining conscious not to over-pay for spectrum licenses.[195]

87. After the conclusion of the 2008 AWS Auction on 21 July 2008, Wind Mobile was informed that it had been provisionally awarded 30 spectrum licenses for an aggregate amount of C$ 442.1 million,[196] covering a population of 23.3 million individuals, the largest population covered among the New Entrants.[197] Industry Canada confirmed that it received Wind Mobile's full payment for these licenses on 27 August 2008.[198] These licenses were eventually issued to Wind Mobile on 13 March 2009 after an extensive review and confirmation of Wind Mobile's compliance with the O&C Rules (discussed further in Part V.A.1 below).

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193 **CWS-Dobbie**, ¶ 16.

194 **CWS-Dobbie**, ¶ 17.

195 **CWS-Dobbie**, ¶ 17.

196 **Exhibit C-082**, Letter from Michael D. Connolly to Michael John O'Connor, 22 July 2008.

197 **Exhibit C-080**, Industry Canada, *Auction of Spectrum Licences for Advanced Wireless Services and Other Spectrum in the 2 GHz Range – Licence Winners*, 21 July 2008, http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf09002.html (last visited 24 September 2017).

198 **Exhibit C-087**, Letter from Mylène Germain to Michael John O'Connor, 27 August 2008.

88. As Minister Prentice announced immediately after bidding had ended, the 2008 AWS Auction had "*exceeded* [Canada's] *expectations*."[199] The Auction raised over C$ 4.3 billion in revenue for the Government (C$ 1.6 billion from twelve New Entrants and C$ 2.6 billion from Incumbents).[200] This total revenue was three times the Government's initial expectations for the Auction.[201]

B. GTH Structures Wind Mobile To Take Advantage Of The Anticipated Relaxation Of The O&C Rules

89. Contemporaneous with the events above and through July 2008, GTH and Globalive negotiated the terms, structure and financing of the joint venture. Below, GTH provides a summary of the key agreements detailing the initial structure of GTH's investment and the funding contributions made by GTH.

1. The Structure Of GTH's Investment In Wind Mobile

90. On 30 July 2008, Globalive Communications Holdings Ontario Inc. ("**GCHO**"), GTH, and Mojo Investments Corp. ("**Mojo**"), a Canadian company owned by Mr. O'Connor, entered into an investment agreement that arranged for subscriptions in capital and detailed the

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[199] **Exhibit C-081**, Industry Canada, *News Release: 15 Companies Bid Almost $4.3 Billion for Licences for New Wireless Services*, 21 July 2008, https://www.canada.ca/en/news/archive/2008/07/15-companies-bid-almost-4-3-billion-licences-new-wireless-services.html (last visited 24 September 2017). *See also* **Exhibit C-078**, David Ljunggren, *Wireless auction going well, Ottawa says*, TORONTO STAR, 10 June 2008.

[200] **Exhibit C-080**, Industry Canada, *Auction of Spectrum Licences for Advanced Wireless Services and Other Spectrum in the 2 GHz Range – Licence Winners*, 21 July 2008, http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf09002.html (last visited 24 September 2017).

[201] **Exhibit C-083**, Email from Delphine Lemarchand to Mike O'Connor et al., 22 July 2008, *attaching* Merrill Lynch, *Industry Overview: Telecom Services-Wireless/Cellular – Canada's wireless spectrum auction ends*, 21 July 2008.

structure of the investment (the "**Amended Investment Agreement**").[202] Under this agreement, GTH agreed to advance funds for the total amount of the purchase price of the set-aside spectrum licenses through its wholly-owned subsidiary GTHCL or one of its affiliates.[203] Once acquired, the spectrum licenses and all rights related thereto would be held by Wind Mobile.[204]

91. On 31 July 2008, GTHCL entered into two Shareholder Agreements ("**SHAs**"). First, GTHCL, Globalive Investment Holdings Corp. ("**Globalive Investment**"), and Globalive Canada Holdings Corp. ("**Globalive Holdco**") entered into a Shareholders' Agreement ("**Globalive Holdco SHA**").[205] Globalive Investment, and GTHCL owned directly or indirectly all of the issued and outstanding share capital of Globalive Holdco.[206] In turn, Globalive Holdco was the sole shareholder of Wind Mobile.[207] Second, GTHCL, Globalive Investment, Mojo, and AAL Holdings Corporation ("**AAL Holdings**"),[208] entered into an

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[202] **Exhibit C-084**, Globalive, *Declaration of Ownership and Control of* Globalive Wireless LP *as a Provisional Winner of Spectrum Licences in the 2GHz Range Including AWS, PCS and the Band 1670-1675 MHz*, 5 August 2008 (hereinafter the "**Declaration of Ownership And Control**"), pp. 16-56 (Amended and Restated Investment Agreement Globalive Communications Holdings Ontario Inc. and Orascom Telecom Holding S.A.E. and Mojo Investments Corp., 30 July 2008 (hereinafter the "**Amended Investment Agreement**")). The Amended Investment Agreement superseded a previous investment agreement signed between Globalive Communications Holdings Ontario Inc., Mojo Investments Corp., and Weather Investments S.p.A in May 2008.

[203] **Exhibit C-084**, Declaration of Ownership and Control, 5 August 2008, p. 31 (Amended Investment Agreement, § 3.7).

[204] **Exhibit C-084**, Declaration of Ownership and Control, 5 August 2008, p. 36 (Amended Investment Agreement, § 3.19).

[205] **Exhibit C-084**, Declaration of Ownership and Control, 5 August 2008, pp. 57-95 (Shareholders' Agreement between Orascom Telecom Holding (Canada) Limited and Globalive Investment Holdings Corp. and Globalive Canada Holdings Corp., 31 July 2008 (hereinafter the "**Globalive Holdco SHA**")).

[206] **Exhibit C-084**, Declaration of Ownership and Control, 5 August 2008, p. 61 (Globalive Holdco SHA, Recitals).

[207] **Exhibit C-084**, Declaration of Ownership and Control, 5 August 2008, p. 61 (Globalive Holdco SHA, Recitals).

[208] AAL Holdings Corporation was a wholly owned subsidiary of AAL Telecom Holdings Incorporated, which was 95% owned by Mr. Lacavera.

additional Shareholders' Agreement (the "**Globalive Investment SHA**").[209] GTHCL, Mojo, and AAL Holdings together owned all of the issued and outstanding share capital of Globalive Investment.[210]

92. In structuring the joint venture, GTH sought to ensure compliance with the existing O&C Rules. As discussed at Part III.B.7, the O&C Rules at the time of GTH's investment precluded a non-Canadian company from owning more than a 33 1/3% of the voting interest in a holding corporation with an operating subsidiary offering telecommunications services in Canada, and more than 20% of the voting interest in the operating subsidiary itself. Thus, while GTH was providing almost all of Wind Mobile's funding, GTH at this time could only hold a minority of the voting shares.

93. Thus, the Articles of Incorporation for Globalive Investment ("**Articles of Incorporation**") and the SHAs were purposefully structured to give GTH the express right to take voting control over Wind Mobile if the O&C Rules were relaxed in the future.[211] This was a key consideration for GTH when making its decision to invest.[212]

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209 **Exhibit C-084**, Declaration of Ownership and Control, 5 August 2008, pp. 96-136 (Shareholders' Agreement between AAL Holdings Corporation and Mojo Investments Corp. and Orascom Telecom Holding (Canada) Limited and Globalive Investment Holdings Corp., 31 July 2008 (hereinafter the "**Globalive Investment SHA**")).

210 **Exhibit C-084**, Declaration of Ownership and Control, 5 August 2008, p. 100 (Globalive Investment SHA, Recitals).

211 **Exhibit C-084**, Declaration of Ownership and Control, 5 August 2008, pp. 80, 92 (Globalive Holdco SHA, Clause 6.6 and Schedule C); **Exhibit C-084**, Declaration of Ownership and Control, 5 August 2008, pp. 119, 134-35 (Globalive Investment SHA, Clause 6.8 and Schedule C); **Exhibit C-084**, Declaration of Ownership and Control, 5 August 2008, pp. 137-49 (Globalive Canada Holdings Corp. Articles of Incorporation); **Exhibit C-084**, Declaration of Ownership and Control, 5 August 2008, pp. 150-65 (Globalive Investment Holdings Corp. Articles of Incorporation).

212 *See supra* Part IV.A.

94. The SHAs were amended several times over the course of the investment, and in particular in response to the Government's duplicative ownership and control reviews (discussed at Part V.A). After these reviews, the approved SHA from December 2009 provided that while GTH held 65.08% of Wind Mobile's equity shares, it owned only 32.03% of the voting shares of the corporation.[213]

95. In October 2010, Wind Mobile notified Industry Canada and the CRTC regarding a proposed transaction involving the change in control at GTH from Weather Investments S.p.A.[214] ("**Weather Investments**") to a group comprised of VimpelCom and Weather Investments.[215] In April 2011, Wind Mobile informed Industry Canada and the CRTC that the transaction closed.[216]

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213 *See* **Exhibit C-020**, Amended and Restated Shareholders' Agreement between AAL Holdings Corporation, Mojo Investments Corp., Orascom Telecom Holding (Canada) Limited, and Globalive Investment Holdings Corp., 15 December 2009. Following the CRTC ownership and control review (*see infra* Part V.A), Globalive Investment and Globalive Holdco were amalgamated.

214 Weather Investments was the majority shareholder of GTH.

215 **Exhibit C-019**, Email from Vanessa Brazil (on behalf of Ken Campbell) to Helen McDonald, 4 October 2010, *attaching* Letter from Ken Campbell to Helen McDonald, 4 October 2010. GTH sent the same letter to the CRTC. *See* **Exhibit C-020**, Email from Vanessa Brazil (on behalf of Ken Campbell) to Konrad von Finckenstein, 4 October 2010, *attaching* Letter from Ken Campbell to Konrad von Finckenstein, 4 October 2010; **CWS-Dobbie**, ¶ 31.

216 **Exhibit C-021**, Email from Vanessa Brazil (on behalf of Ken Campbell) to Helen McDonald, 15 April 2011, *attaching* Letter from Ken Campbell to Helen McDonald, 15 April 2011. GTH send the same letter to the CRTC. *See* **Exhibit C-022**, Email from Vanessa Brazil (on behalf of Ken Campbell) to Konrad von Finckenstein, 15 April 2011, *attaching* Letter from Ken Campbell to Konrad von Finckenstein, 15 April 2011; **CWS-Dobbie**, ¶ 31.

2. GTH's Equity Contribution And Loans

96. On 1 April 2009, GTH provided an equity contribution of C$ 82,690,158 through the purchase of Globalive Investment shares previously owned by minority investors and the subscription of new shares.[217]

97. In addition to this equity contribution, GTH agreed to make two loans to Wind Mobile. First, GTH agreed to make a non-revolving term loan to Wind Mobile in the principal amount of C$ 66,000,000 plus interest (the "**Operating Loan**"), signed on 23 March 2008.[218] Subsequently, through a series of amendments this amount increased through the duration of GTH's investment to reach C$ 805,101,782.[219]

98. In addition, GTH agreed to advance the funds necessary to purchase the spectrum acquired from the 2008 AWS Auction,[220] and on 31 July 2008, GTH made a term loan to Wind Mobile for an aggregate maximum principal amount of C$ 442,403,000 (the "**Spectrum Loan**").[221]

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217 *See* **CER-Dellepiane/Spiller**, ¶ 41.

218 **Exhibit C-092**, Letter from Martin Masse to Michael D. Connolly, *attaching* revised Declaration of Ownership and Control of Globalive Wireless Management Corp., 2 March 2009 (hereinafter "**Revised Declaration of Ownership and Control**"), pp. 163-88 ($66,000,000 Term Loan Agreement (Revised Version) between Orascom Telecom Holding S.A.E. and Globalive Wireless Management Corp., 23 March 2008, *with* Schedules (hereinafter "**Operating Loan**").

219 *See* **CER-Dellepiane/Spiller**, ¶ 46; [redacted]

220 *See* **Exhibit C-084**, Declaration of Ownership and Control, 5 August 2008, p. 31 (Amended Investment Agreement, § 3.7).

221 **Exhibit C-092**, Revised Declaration of Ownership and Control, pp. 137-62 ($442,403,000 Term Loan Agreement (Revised Version) between Orascom Telecom Holding (Canada) Limited and Globalive Wireless Management Corp., 31 July 2008, *with* Schedules (hereinafter "**Spectrum Loan**")). GTHCL assigned the Spectrum Loan to GTH on 5 August 2008.

99. In sum, GTH invested a total nominal amount of over C$ 1.3 billion in Wind Mobile (not including interest) through: an equity investment of C$ 82.7 million; the Operating Loan for C$ 805.1 million; and the Spectrum Loan for C$ 442.4 million.

C. Overview Of GTH's Key Expectations At The Time GTH Begins Its Investment In Canada

100. To inform its decision to invest, GTH reviewed a wide breadth of information detailing the framework Canada had created for the 2008 AWS Auction.[222] On this basis, GTH had two key expectations.

101. First, GTH expected that Canada would promote a regulatory environment which would afford New Entrants the chance of successfully competing against the Incumbents. This commitment was reflected in the statements contained in Canada's policy documents and Wind Mobile's set-aside spectrum licenses, which emphasized Canada's commitment to alleviating barriers to market entry to encourage new entry in the wireless market:

(a) At the outset, Section 7(c) of the Telecommunications Act states that one of the objectives for Canadian telecommunications policy is "*to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications*."[223] This objective informed all of Canada's policy documents leading up to the 2008 AWS Auction, and Canada made clear from the outset that it sought to foster a competitive wireless market by enabling market entry.[224] In these policy documents,[225] Canada recognized the significant "*barriers to market*

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[222] *See, e.g.*, **CWS-Dobbie**, ¶ 10; **Exhibit C-064**, Email from Mike O'Connor to Investment Committee, et al., 28 February 2008, *attaching* [redacted]
Exhibit C-066, Email from Mike O'Connor to Assaad Kairouz, et al., 29 February 2008, *attaching* Globalive materials.

[223] **Exhibit C-046**, Telecommunications Act, § 7(c).

[224] *See supra* Part III.B.

[225] **Exhibit C-050**, AWS Auction Consultation, § 2.5.

entry" faced by prospective New Entrants—including the high risk of the investment, the significant capital costs, and the inability to access important infrastructure—and explained that it was implementing measures in its 2008 AWS Auction framework designed to "*sustain and enhance competition*."[226] It sought to curtail these barriers to entry by implementing the set-aside, mandatory roaming, and mandatory tower and site sharing.[227]

(b) Mr. Connolly, the former Director General, Spectrum Management Operations of Industry Canada, who oversaw the 2008 AWS Auction Framework, confirms that a key objective of the AWS auction was to facilitate the entry of new operators. He explains that it was clear that without alleviating barriers to market entry, "*these barriers would both deter prospective investors from participating in the auction, as well as hinder their ability to compete effectively if successful in bidding for spectrum licences*."[228] He explained that the set-aside of spectrum and the mandatory roaming and site-sharing conditions were understood by Industry Canada to be "*necessary to facilitate investment in the AWS Auction and the subsequent investment required to support a New Entrant thereafter*."[229]

(c) Wind Mobile's set-aside spectrum licenses memorialized these commitments as part of their conditions of license:

> ***13. Mandatory Antenna Tower and Site Sharing***
>
> *The licensee must comply with the mandatory antenna tower and site sharing requirements set out in Industry Canada's Client Procedures Circular CPC-2-0-17 Conditions of Licence for Mandatory Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements, as amended from time to time.*
>
> ***14. Mandatory Roaming***
>
> *PCS and AWS licensees must comply with the mandatory roaming requirements set out in Industry Canada's Client Procedures Circular CPC-2-0-17 Conditions of Licence for Mandatory Roaming and Antenna*

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226 **Exhibit C-004**, AWS Auction Policy Framework, p. 4.

227 *See supra* Part III.B.

228 **CWS-Connolly**, ¶ 12.

229 **CWS-Connolly**, ¶ 12.

Tower and Site Sharing and to Prohibit Exclusive Site Arrangements, as amended from time to time.[230]

(d) In 2012, Christian Paradis, the Minister of Industry at the time, would look back on the 2008 AWS Auction and claim that "[i]*n the last spectrum auction . . . government took action to encourage new entry in the wireless market*."[231]

102. GTH relied on Canada's statements in forming its expectations concerning the regulatory environment, which were critical for Wind Mobile's operations:

(a) Mr. Campbell, the CEO of Wind Mobile in the early years of GTH's investment, confirms that the mandatory roaming and tower and site sharing conditions were critical to Wind Mobile's success.[232]

(b) Globalive similarly shared this expectation on mandatory roaming and tower sharing as reflected in its materials provided to GTH in February 2008:

- Globalive's Investor Presentation summarized the key terms of the 2008 AWS Auction, observing that this was a "*unique*" opportunity "[i]*n a highly profitable and underpenetrated market . . .* [t]*hat continues to experience strong growth*."[233] It observed that "[m]*andated roaming / tower sharing significantly reduce entry costs / time to market*."[234]

- Globalive's Private Placement Memorandum provided that through the set-aside, "*the government has guaranteed that there will be at least one new competitive player in the Canadian wireless market*," emphasizing that the mandatory roaming and tower and site sharing provisions had created

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230 **Exhibit C-010**, Letter from Michael D. Connolly to Kenneth Campbell, *attaching* Wind Mobile Licences (hereinafter the "**Wind Mobile Licenses**"), Conditions 13-14 (emphasis added).

231 **Exhibit C-123**, Industry Canada, *Speech: Speaking Points – The Honourable Christian Paradis, PC, MP Minister of Industry, Telecommunications Decisions*, 14 March 2012, https://www.canada.ca/en/news/archive/2012/03/telecommunications-decisions.html (last visited 24 September 2017).

232 **CWS-Campbell**, ¶¶ 8-9.

233 **Exhibit C-066**, Email from Mike O'Connor to Assaad Kairouz, et al., 29 February 2008, *attaching* Globalive materials, pp. 13-54 (*Investor Presentation Globalive Wireless Partnership*, 26 February 2008, Slide 3).

234 **Exhibit C-066**, Email from Mike O'Connor to Assaad Kairouz, et al., 29 February 2008, *attaching* Globalive materials, pp. 13-54 (*Investor Presentation Globalive Wireless Partnership*, 26 February 2008, Slide 4).

"*significant network capital cost and operating cost subsidies, as well as enhanced time-to-market capabilities*."[235]

- Brice Scheschuk, Globalive's Chief Financial Officer, in describing the assumptions contained in Globalive's financial model, observed that "*the set aside rules encompass three key benefits for new entrants*," namely, that Incumbents would be prohibited from bidding on set-aside spectrum, mandatory tower sharing at commercial rates with a pre-defined arbitration process, and mandatory roaming at commercial rates with a pre-defined arbitration process.[236]

103. GTH's expectations were also consistent with the views of industry participants at the time of the 2008 AWS Auction. For example:

(a) In an RBC Capital Markets presentation received and reviewed by GTH in February 2008, RBC summarized the 2008 AWS Auction Framework, observing that the goal of Industry Canada was "*to increase competitiveness in the market and enable further innovation in the industry*."[237] RBC listed the provisions which required roaming and tower sharing at commercial terms.[238]

(b) JPMorgan likewise emphasized in its presentation to GTH the comments Industry Canada had received from prospective New Entrants, stating that mandatory roaming was "[i]*mportant for new entrants' decision to participate in the auction*" and "*required to ensure competitiveness of new entrants*."[239] Tower sharing was

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[235] **Exhibit C-066**, Email from Mike O'Connor to Assaad Kairouz, et al., 29 February 2008, *attaching* Globalive materials, pp. 55-108 (*Globalive Wireless LP Private Placement Memorandum (v2)*, 15 February 2008, at § 1.1 ("*Mandated tower sharing should be a significant mitigating factor to the lack of independent tower companies in Canada*.") and § 4.2 ("*Mandated roaming provides a benefit to new entrants as it allows them to access built out networks quickly and launch services prior to building out cell sites.*")).

[236] **Exhibit C-066**, Email from Mike O'Connor to Assaad Kairouz, et al., 29 February 2008, *attaching* Globalive materials, pp. 373-94 (Brice Scheschuk, *Financial Model Assumptions and Considerations*, 15 February 2008, p. 1).

[237] **Exhibit C-064**, Email from Mike O'Connor to Investment Committee, et al., 28 February 2008, *attaching* RBC Capital Markets, *Canadian Wireless Spectrum Auction: Discussion Materials*, 11 January 2008, p. 8.

[238] **Exhibit C-064**, Email from Mike O'Connor to Investment Committee, et al., 28 February 2008, *attaching* RBC Capital Markets, *Canadian Wireless Spectrum Auction: Discussion Materials*, 11 January 2008, pp. 10-11.

[239] **Exhibit C-072**, JPMorgan, *Orascom Telecom – Canadian Wireless Opportunity*, 10 April 2008, p. 20.

likewise "*crucial for the speed of roll-out*" and "[l]*ack of tower sharing guarantees that new entrants' service will be uncompetitive*."[240]

(c) Other prospective investors noted that "*Canada's upcoming wireless auctions present an opportunity to build a new wireless carrier*" with the opportunity "*substantially enhanced with the recent Industry Canada rules*" including the set aside of spectrum, mandatory roaming, and mandatory tower sharing.[241] The prospective investor described that "*Canadian regulators at Industry Canada have taken an exceptionally supportive position in favor of new entrants*."[242]

(d) Mobilicity (another New Entrant who participated in the 2008 AWS Auction), concurs, stating that it understood that Canada was committed to enforcing these conditions in order to alleviate barriers to market entry, and that it relied on these assurances in making the decision to invest.[243]

104. Second, GTH expected that once the Five-Year Rollout Period expired, the prohibition on a New Entrant's ability to transfer Wind Mobile's set-aside spectrum licenses to an Incumbent would expire and GTH would be free to transfer these licenses to an Incumbent. Once again, this commitment was express in Canada's policy documents and Wind Mobile's set-aside spectrum licenses:

(a) Section 7(f) of the Telecommunications Act states that one of the objectives for Canadian telecommunications policy is "*to foster increased reliance on market forces for the provision of telecommunications services and to ensure that regulation, where required, is efficient and effective*."[244] Canada's policy

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240 **Exhibit C-072**, JPMorgan, *Orascom Telecom – Canadian Wireless Opportunity*, 10 April 2008, p. 20.

241 **Exhibit C-075**, Email from Ragy Soliman to Assaad Kairouz and David Dobbie, 25 April 2008, *attaching* Council Tree Communications, Inc., *Discussion Materials for TA Associates Regarding a Canadian Wireless Carrier Investment*, 20 January 2008, pp. 5, 7.

242 **Exhibit C-075**, Email from Ragy Soliman to Assaad Kairouz and David Dobbie, 25 May 2008, *attaching* Council Tree Communications, Inc., *Discussion Materials for TA Associates Regarding a Canadian Wireless Carrier Investment,* 20 January 2008, p. 13.

243 **Exhibit C-228**, *Quadrangle Group LLC, QCP CW S.A.R.L., and Data & Audio-Visual Enterprises Investments Inc. v. Attorney General of Canada*, Ontario Superior Court of Justice, Court File No. CV-14-511539, Amended Statement of Claim, 3 October 2014 (hereinafter "**Mobilicity Litigation – Amended Statement of Claim**"), ¶¶ 56-64.

244 **Exhibit C-046**, Telecommunications Act, § 7(f).

documents reinforce the same principle.[245] Canada did not originally anticipate including a restriction on the transfer of set-aside spectrum for any period of time. Rather, Canada envisioned that licenses would be freely transferable and divisible in the secondary market (a feature it deemed necessary for an "*effective market*").[246] It considered that if conditions caused unviable market entry by an investor, market forces would also act to correct that entry (presumably by sale).[247] It was on this basis that during the auction consultation process Canada released an updated general spectrum licensing framework that memorialized the typical "*enhanced transferability and divisibility*" rights attached to spectrum licensed at an auction.[248] The five-year restriction on transfer incorporated in the 2008 AWS Auction was, as Canada explained, "*aimed at avoiding circumvention of the set-aside*" and adopted in response to third-party comments.[249]

(b) Wind Mobile's set-aside spectrum licenses memorialized these expectations as conditions of license:

> ***2. License 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*

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245 *See supra* Part III.B.

246 **Exhibit C-050**, AWS Auction Consultation, §§ 5.1, 5.3.

247 **Exhibit C-050**, AWS Auction Consultation, § 2.7.

248 **Exhibit C-003**, Spectrum Licensing Procedure, § 5.6.

249 *See* **Canada's Request for Bifurcation**, ¶ 9.

> *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 the Department may grant such requests based on the merits of the proposal and conformity with the policy objectives. The licensee may also apply to use a subordinate licensing process.* ***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****.*[250]

(c) Mr. Connolly confirms that Industry Canada imposed a limited five year restriction on the transfer of set-aside spectrum licenses to Incumbents because it was "*long enough to mitigate against speculation and to provide an incentive to New Entrants to build networks and offer competing services, while affording New Entrants the expectation of the ability to exit the market and divest the licences after five years should they not succeed*."[251] He explains that Industry Canada was "*fully aware that an indefinite ban on any sale of set-aside spectrum would deter New Entrants from bidding in the AWS Auction*."[252]

105. Canada's policies informed GTH's expectations at the time of its participation in the 2008 AWS Auction:

(a) Mr. Dobbie explains that at the outset of the investment, GTH "*understood* [the five-year] *provision to mean that, after the five-year period was up, a New Entrant would be able to sell set-aside spectrum licences to an Incumbent*" and states that "*one of the exit strategies considered by GTH and Globalive was a sale to an Incumbent after five years*."[253]

(b) Similarly, the investor materials of GTH's local partner reflected the same understanding:

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[250] **Exhibit C-010**, Wind Mobile Licenses, Condition 2 (emphasis added).

[251] **CWS-Connolly**, ¶ 13.

[252] **CWS-Connolly**, ¶ 13.

[253] **CWS-Dobbie**, ¶ 10.

- Globalive's Investor Presentation emphasized that AWS spectrum would be "[v]*alued by incumbents, potential foreign entrants in the future*."[254]

- Its Private Placement Memorandum explained that "[t]*he key restriction that Industry Canada placed on new entrants is the inability to sell the acquired new entrant spectrum to an incumbent until five years after acquisition*."[255] In particular, the Memorandum noted that "*Exit strategies could take many forms and include an initial public offering,* ***a sale to an incumbent after five years*** *or sale to any other party (that meets the foreign ownership restrictions) at any time*."[256]

- Mr. Scheschuk repeated the conditions identified in the Private Placement Memorandum in his note describing the assumptions contained in Globalive's financial model.[257] Moreover, he noted that capitalizing on the set-aside spectrum auction could theoretically occur by "*holding* [the spectrum] *for five years with no operations and taking a chance on a positive return through a straight sale to an incumbent*."[258] As Mr. Scheschuk stated succinctly: "***We believe that the spectrum will have significant value on a stand-alone basis to either an incumbent (five years after acquisition) or another entrant within five years****. . . the need for additional spectrum should grow with data usage and there is inherent value to an incumbent to keep spectrum from other incumbents*."[259] Mr. Scheschuk further described the past experiences of

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254 **Exhibit C-066**, Email from Mike O'Connor to Assaad Kairouz, et al., 29 February 2008, *attaching* Globalive materials, pp. 13-54 (*Investor Presentation Globalive Wireless Partnership*, 26 February 2008, Slide 4).

255 **Exhibit C-066**, Email from Mike O'Connor to Assaad Kairouz, et al., 29 February 2008, *attaching* Globalive materials, pp. 55-108 (*Globalive Wireless LP Private Placement Memorandum (v2)*, 15 February 2008, § 3.1).

256 **Exhibit C-066**, Email from Mike O'Connor to Assaad Kairouz, et al., 29 February 2008, *attaching* Globalive materials, pp. 55-108 (*Globalive Wireless LP Private Placement Memorandum (v2)*, 15 February 2008, § 3.4).

257 **Exhibit C-066**, Email from Mike O'Connor to Assaad Kairouz, et al., 29 February 2008, *attaching* Globalive materials, pp. 373-94 (Brice Scheschuk, *Financial Model Assumptions and Considerations*, 15 February 2008, p. 1).

258 **Exhibit C-066**, Email from Mike O'Connor to Assaad Kairouz, et al., 29 February 2008, *attaching* Globalive materials, pp. 373-94 (Brice Scheschuk, *Financial Model Assumptions and Considerations*, 15 February 2008, pp. 1-2.)

259 **Exhibit C-066**, Email from Mike O'Connor to Assaad Kairouz, et al., 29 February 2008, *attaching* Globalive materials, pp. 373-94 (Brice Scheschuk, *Financial Model Assumptions and Considerations*, 15 February 2008, pp. 13 ("*The key restriction that Industry Canada set on new entrants is the inability to sell the acquired new entrant spectrum to an incumbent until five years after acquisition*.") and 19 ("*Exit strategies could take many forms and include an IPO, sale to an incumbent after five years or sale to any other party (that meets the foreign ownership restrictions) within five years*.")).

> Clearnet and Microcell, both new entrants that ultimately "*were acquired by Incumbents*."[260]

106. GTH's advisors shared the same expectation at the time of the 2008 AWS Auction. For example:

(a) In its presentation to GTH, JPMorgan explained simply that in relation to the set-aside spectrum, "[l]*icense may not be transferred to incumbent companies for 5 years from issuance*."[261] JPMorgan highlighted the Microcell case, reviewing the factors that "*created value in Rogers' acquisition of Microcell*."[262] It described:

> *Microcell was the clear #4 in a 4-player Canadian wireless market . . . however, when it launched Vancouver City Fido in October 2003, Microcell drew TELUS' attention . . . While the response from TELUS, Rogers and Bell was strong, Microcell established that it was here to stay . . . leading to an unsolicited $29/share offer by TELUS in May 2004 . . . After TELUS' offer was deemed inadequate by Microcell's board, Rogers ultimately agreed to a $35/share offer in September 2004*.[263]

(b) An analyst at Merrill Lynch advised GTH that selling spectrum purchased in the AWS Auction was an option, noting that New Entrants "*can resell to new entrants, but if* [New Entrants] *buy set aside spectrum, they can'* [sic] *resell to incumbents for five years*."[264]

107. Other New Entrants and Incumbents likewise shared this understanding at the time:

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[260] **Exhibit C-066**, Email from Mike O'Connor to Assaad Kairouz, et al., 29 February 2008, *attaching* Globalive materials, pp. 373-94 (Brice Scheschuk, *Financial Model Assumptions and Considerations*, 15 February 2008, p. 2).

[261] **Exhibit C-072**, JPMorgan, *Orascom Telecom – Canadian Wireless Opportunity*, 10 April 2008, p. 19.

[262] **Exhibit C-072**, JPMorgan, *Orascom Telecom – Canadian Wireless Opportunity*, 10 April 2008, p. 28.

[263] **Exhibit C-072**, JPMorgan, *Orascom Telecom – Canadian Wireless Opportunity*, 10 April 2008, pp. 23-27.

[264] **Exhibit C-077**, Email from Aldo Mareuse to Mike O'Connor and Investment Committee, 5 June 2008.

(a) Mobilicity's investors assert that they were told by Industry Canada that they would be permitted to sell their set-aside spectrum licenses to an Incumbent after five years.[265]

(b) A senior representative of Rogers stated that at the time of the Auction, he was informed by an Assistant Deputy Minister of Industry Canada that Incumbents would be permitted to purchase set-aside spectrum licenses from New Entrants after five years.[266]

(c) The press reported widely that Shaw may have participated in the 2008 AWS Auction with the intention of sitting on the spectrum licenses to sell them five years later to an Incumbent.[267] This is, in fact, what Shaw did.[268]

108. Finally, this collective understanding continued well after the 2008 AWS Auction was complete:

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[265] **Exhibit C-228**, Mobilicity Litigation – Amended Statement of Claim, ¶ 29.

[266] **Exhibit C-223**, Howard Solomon, *Industry Canada once willing to let incumbents buy startups: Rogers*, IT WORLD CANADA, 18 June 2014, http://www.itworldcanada.com/article/industry-canada-once-willing-to-let-incumbents-buy-startups-rogers/94646 (last visited 24 September 2017).

[267] **Exhibit C-073**, Andrew Willis, *New wireless players expected to buy and flip*, THE GLOBE & MAIL, 30 April 2008, https://beta.theglobeandmail.com/report-on-business/streetwise/new-wireless-players-expected-to-buy-and-flip/article1341694/?ref=http://www.theglobeandmail.com& (last visited 24 September 2017) ("*Industry veterans also point to Shaw Communications as a potential buy-and-flip wireless player. The cable company has justified this view by cautioning investors not to read too much into its decision to put up a $400-million deposit ahead of the auction. Obviously, having someone park spectrum for a few years, then sell it to one of the big three is not going to mess up the strong underlying economics of the Canadian wireless market*."). *See also* **Exhibit C-074**, Andrew Willis, *Spectrum auction drawing attention of buy-and-flip brigade*, THE GLOBE & MAIL, 1 May 2008, https://beta.theglobeandmail.com/globe-investor/investment-ideas/spectrum-auction-drawing-attention-of-buy-and-flip-brigade/article1324843/?ref=http://www.theglobeandmail.com& (last visited 24 September 2017); **Exhibit C-071**, David George-Cosh, *Cellphone competition about to heat up*, NATIONAL POST, 19 March 2008 ("*Still, analysts caution that the release of the applicant list does not immediately translate into a viable company. Aside from the additional capital needed to deploy a service, spectrum could be viewed as a strategic asset that could be held for five years and later resold for a premium. 'I think that there's a lot of rethinking going around' said Iain Grant, managing director for SeaBoard Group. 'With every dollar you spend on spectrum, you're going to need to spend two or three on hardware. It would also be good to have some money left over for marketing as well. Or they could just flip it.*"").

[268] *See infra* Part V.E.

(a) Merrill Lynch reported immediately after the auction that "[t]*he substantial incumbent/new entrant spectrum pricing gap could encourage some new entrant bidders to hold their spectrum for resale*."[269]

(b) When the CRTC decided that Wind Mobile did not comply with the O&C Rules, Genuity Capital Markets advised that one option for Wind Mobile was to "*sit on its spectrum in the hope that foreign ownership restrictions are lifted in Canada. Alternatively, it could wait for 5 years, after which time incumbents are allowed to own the AWS spectrum that was initially reserved for new entrants like Globalive*."[270]

(c) The media later observed that "*even before the new entrants launched service, industry observers expected the companies to sell out to larger players*."[271] Bell, an Incumbent, explained in a 2013 presentation that the intent behind the five-year restriction on transfer "*was to prevent spectrum speculation, not harm entrants' shareholders who put risk capital to work*."[272]

(d) GTH relied on this expectation when assessing future strategies for the business in 2011, including a potential exit by sale to an Incumbent.[273]

(e) When Industry Canada considered whether to introduce its new transfer framework in 2013—discussed at Part V.C.2—it confirmed in an internal presentation to the Deputy Minister: "*aside from the 5-year restriction on AWS spectrum, **there are no other specific conditions***."[274]

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269 **Exhibit C-083**, Email from Delphine Lemarchand to Mike O'Connor et al., 22 July 2008, *attaching* Merrill Lynch, *Industry Overview: Telecom Services-Wireless/Cellular – Canada's wireless spectrum auction ends*, 21 July 2008, p. 1.

270 **Exhibit C-103**, Email from Dvai Ghose to Aldo Mareuse, 29 October 2009.

271 **Exhibit C-164**, Rita Trichur, et al., *Wind Mobile on block in new wireless shakeup*, THE GLOBE & MAIL, 21 March 2013, https://beta.theglobeandmail.com/report-on-business/wind-mobile-on-block-in-new-wireless-shakeup/article10062360/ (last visited 24 September 2017).

272 **Exhibit C-204**, Email from Victor Hwei to Carsten Revsbech, et al., 25 July 2013, *attaching* Bell, *Wireless policy loopholes hurt Canada and Canadians*, July 2013, p. 7.

273 *See infra* Part V.C.2.

274 **Exhibit C-131**, Email from Rebecca Guillemette to Cindy-Lee Cook, et al., 10 December 2012, *attaching* Industry Canada, *Wireless Telecommunications Sector: Status Update and Implications*, 10 December 2012 [ATI Document], Slide 14 (emphasis added).

109. In sum, everyone—including Industry Canada—expected at the time of the 2008 AWS Auction, that Canada would: (*i*) maintain a regulatory environment that would afford New Entrants the chance of successfully competing against the Incumbents; and (*ii*) allow New Entrants to transfer their set-aside spectrum licenses to an Incumbent once the Five-Year Rollout Period expired.

110. As set forth below, Canada would breach each of these expectations, causing substantial harm to GTH and its investment.

V. CANADA'S WRONGFUL ACTS THAT CUMULATIVELY PREVENTED GTH FROM BENEFITING FROM ITS C$ 1.3 BILLION INVESTMENT

111. As required by the framework created by Canada, from the outset GTH committed substantial funds and resources to set Wind Mobile on the path to success. By October 2009, only eight months after it was issued its set-aside spectrum licenses, Wind Mobile had hired approximately 800 employees and set-up its headquarters in Toronto.[275] By the time of GTH's exit from Canada in September 2014, it had invested over C$ 1.3 billion in Wind Mobile to sustain the business. In other words, GTH was exactly the type of committed investor Canada had sought to enter the wireless telecommunications market.

112. Yet, as described below, contrary to the policies and conditions Canada had put in place to induce GTH to invest in a New Entrant, Canada implemented a series of measures that gradually eroded the value of GTH's investment and left it no choice but to exit the market.

113. First, Canada subjected Wind Mobile to the CRTC's duplicative ownership and control review process, that was intrusive, targeted, and ultimately inconsistent with the decision that had already been made after review of Wind Mobile's compliance with the very same O&C Rules by Industry Canada.

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[275] *See* **Exhibit C-106**, Email from Ken Campbell to Khaled Bichara, et al., 31 October 2009, *attaching* Letter from Ken Campbell to the Honourable Tony Clement, 31 October 2009; **Exhibit C-105**, RBC Capital Markets, *Industry Comment: Telecommunication Services – Trick or Treat: CRTC Strikes Possible Deathblow to Globalive*, 30 October 2009 ("*According to the Globalive press release, the company has hired over 800 staff and was planning to launch in Toronto and Calgary in a few short weeks. In our view, Globalive (operating under the brand WIND) was potentially the biggest and most disruptive of all the new entrants.*"). *See also* **Exhibit C-104**, Grant Robertson, *Globalive phone battle headed to cabinet*, THE GLOBE & MAIL, 29 October 2009, https://beta.theglobeandmail.com/globe-investor/globalive-phone-battle-headed-to-cabinet/article4297397/?ref=http://www.theglobeandmail.com& (last visited 24 September 2017) ("*The move presents a golden opportunity for other upstart wireless carriers looking to enter the market, since Globalive was one of the more aggressive new players and will now be delayed*.").

114. Second, Canada failed to address, in any meaningful way, key barriers to market entry, despite its promises to do so. Instead, from the start of GTH's investment, Canada would allow Incumbents to engage in pervasive anti-competitive behavior until finally, in March 2013, Canada attempted to introduce reforms. By this time, four years had passed and it was too little, too late. Aggravating GTH's position further, in response to GTHCL's Voting Control Application filed in October 2012, Canada initiated an opaque "*national security*" review procedure [redacted]

115. At this point GTH had no choice but to consider, as one of its options, an exit from the market. When the press began to report in 2013 that GTH (and other investors) might seek to exit the market by selling their New Entrants to the Incumbents, Industry Canada responded by blocking these sales through the introduction of a new transfer policy. This new framework effectively prohibited GTH as a New Entrant from selling its set-aside spectrum licenses to an Incumbent even **after** the expiration of the Five-Year Rollout Period, contrary to GTH's expectations. This act amounted to a complete frustration of Canada's promise at the time of the 2008 AWS Auction.

116. In sum, Canada, having failed to live up to its promises to implement reasonable and effective measures to facilitate market entry and address barriers, now refused to allow GTH to exit the market on the terms that it had promised GTH at the outset of its investment.

117. Without a commercially reasonable basis to continue funding Wind Mobile[276] and in light of Canada's treatment of its investment, GTH had no real choice but to seek to exit the market by selling to a non-Incumbent and recover whatever value it could as soon as possible. In September 2014, GTH sold Wind Mobile to a consortium of investors for approximately C$ 295 million (in a transaction in which the purchasers agreed to acquire approximately C$ 135 million worth of debt owed to VimpelCom as well as C$ 160 million in vendor loans, while GTH received only C$ 11). Following GTH's exit, Canada engineered two transactions that awarded Wind Mobile substantial amounts of spectrum licenses for almost no consideration, setting the stage for the December 2015 re-sale of Wind Mobile to Shaw for C$ 1.6 billion.

118. GTH describes each of these events in further detail below.

A. The Duplicative And Inconsistent Ownership & Control Reviews

119. As noted above, after the 2008 AWS Auction, GTH was subjected to two separate, duplicative, and inconsistent reviews to determine whether Wind Mobile satisfied the O&C Rules. These two reviews, one completed by Industry Canada and the other by the CRTC, are discussed in further detail below.

[276] At this time GTH was reliant on shareholder loans from VimpelCom for the funding of Wind Mobile. *See* **CWS-Dry**, ¶ 9.

1. Industry Canada Confirms Wind Mobile's Compliance With The O&C Rules

120. In accordance with Section 7.4 of the 2007 AWS Auction Licensing Framework[277] and a letter from Mr. Connolly confirming Wind Mobile as a provisional license winner,[278] on 5 August 2008, Wind Mobile submitted its Declaration of Ownership and Control to Industry Canada.[279] As required, the Declaration of Ownership and Control included the Investment Agreement, Shareholder Agreements, Loan Agreements, and detailed information reflecting Wind Mobile's corporate structure.[280]

121. Shortly thereafter, on 18 August 2008, Telus (an Incumbent) sent a letter to Industry Canada advocating for "*an open and transparent public process for the . . . review of eligibility to hold AWS licenses*."[281] Telus requested that Canada place redacted versions of all filings on the public record and allow the submission of comments and replies once the record was complete.[282] Three days later, Rogers (another Incumbent) informed Industry Canada that it supported Telus's request.[283] Industry Canada at this time rejected

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277 **Exhibit C-005**, AWS Auction Licensing Framework, pp. 28-29.

278 **Exhibit C-082**, Letter from Michael D. Connolly to Michael John O'Connor, 22 July 2008.

279 **Exhibit C-084**, Declaration of Ownership and Control to Industry Canada, 5 August 2008 (hereinafter the "**Declaration of Ownership and Control**"). The applicant of the Declaration of Ownership and Control was Globalive Wireless LP with Globalive Wireless Management Corp. ("**GWMC**," which would later operate under the brand "*Wind Mobile*") as its general partner. The Declaration indicated that Globalive Wireless LP would be wound up into GWMC and that any spectrum licenses awarded would be issued to GWMC. *See* **Exhibit C-084**, Declaration of Ownership and Control.

280 **Exhibit C-084**, Globalive, *Declaration of Ownership and Control of* Globalive Wireless LP *as a Provisional Winner of Spectrum Licences in the 2GHz Range Including AWS, PCS and the Band 1670-1675 MHz*, 5 August 2008.

281 **Exhibit C-085**, Fax from Michael Hennessy to Michael John O'Connor, 18 August 2008, *attaching* Letter from Michael Hennessy to Kevin Lindsey, 18 August 2008, p. 1.

282 **Exhibit C-085**, Fax from Michael Hennessy to Michael John O'Connor, 18 August 2008, *attaching* Letter from Michael Hennessy to Kevin Lindsey, 18 August 2008, p. 4.

283 **Exhibit C-086**, Letter from Dawn Hunt to Kevin Lindsey, 21 August 2008.

the Incumbents' request, choosing not to deviate from its standard procedure, which recognized the importance of confidentiality during this review process.[284]

122. For the next seven months, Wind Mobile and its legal representatives worked with Industry Canada to supplement and amend its structure documents to ensure compliance with the O&C Rules. During the review, Industry Canada submitted several requests to Wind Mobile for further information and identified areas of specific concern.[285] In addition, Industry Canada and Wind Mobile participated in several meetings to discuss the investment structure, potential areas of concern, and changes that could be made to alleviate those concerns.[286]

123. During these meetings, external counsel for GTH raised with Industry Canada the provision allowing GTH to take voting control over Wind Mobile in the event the O&C Rules were relaxed,[287] and Industry Canada was comfortable with this provision.[288] Such a provision was a common feature of structures involving non-Canadian entities.[289]

124. Following its extensive review of Wind Mobile's foundational documents and the changes made in response to its concerns, on 16 February 2009, Industry Canada found that Wind Mobile was in compliance with the O&C Rules.[290] On 2 March 2009, Wind Mobile

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284 **CWS-Connolly**, ¶ 19.

285 **CWS-Campbell**, ¶ 17; **CWS-Dobbie**, ¶¶ 20-22.

286 **CWS-Campbell**, ¶ 17; **CWS-Dobbie**, ¶ 20.

287 *See supra* Part IV.B.

288 **CWS-Dobbie**, ¶ 21.

289 **CWS-Dobbie**, ¶ 21.

290 **Exhibit C-091**, Letter from Michael D. Connolly to Kenneth Campbell, 16 February 2009.

delivered a complete copy of the revised Declaration of Ownership and Control, with attached revised SHAs and other documentation.[291]

125. Accordingly, on 13 March 2009 Industry Canada formally issued to Wind Mobile its set-aside spectrum licenses.[292]

2. The CRTC Conducts A Duplicative, Targeted, & Public Second Review Of Wind Mobile's Compliance With The O&C Rules, And Reaches A Conflicting And Incorrect Decision

126. While Industry Canada's review was underway, on 22 December 2008, the CRTC sent a letter to all New Entrants, including Wind Mobile, offering to conduct a pre-operational review of their compliance with the O&C Rules as set forth in the Telecommunications Act.[293] As discussed in Part III.B.7, the O&C Rules contained in the Telecommunications Act are identical to those assessed by Industry Canada pursuant to the Radiocommunication Regulations in effect at this time.

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[291] **Exhibit C-092**, Letter from Martin Masse to Michael D. Connolly, *attaching* revised Declaration of Ownership and Control of Globalive Wireless Management Corp., 2 March 2009.

[292] **Exhibit C-010**, Wind Mobile Licenses.

[293] **Exhibit C-008**, Letter from John Keogh to Simon David Lockie, 22 December 2008. Specifically, in this letter, the CRTC explained that "*The Canadian Radio-television and Telecommunications Commission is responsible for ensuring that this requirement of the Act is complied with by Canadian carriers. While I understand that your company is not yet utilizing the spectrum you bid on to operate as a Canadian carrier, once your company is operating it will need to be compliant with the Canadian ownership provisions of the Act. In order to assist your company the Commission is prepared to review your ownership prior to your commencement of operations in order to ensure that it meets the requirements of the Act.*"

127. Therefore, GTH reasonably understood that any such review would be straightforward and the decision consistent with Industry Canada's decision.[294] In other words, GTH understood that the CRTC process would be a "*mere formality*."[295]

128. On 3 April 2009, Wind Mobile submitted its Industry Canada-approved materials to the CRTC, along with a request for a timely review so that Wind Mobile could commence operations in autumn.[296]

129. On 20 April 2009, Telus wrote to the CRTC requesting that the CRTC initiate an "*open and transparent*" ownership and control review of Wind Mobile.[297] Two days later, Shaw, in receipt of Telus's letter, submitted its own letter to the CRTC supporting Telus's position and specifically highlighting that GTH might seek to obtain voting control of Wind Mobile if the O&C Rules were relaxed in the future—apparently a concern worthy of further review.[298]

130. Wind Mobile responded to Telus's letter on 5 May 2009, observing at the outset that the CRTC's review had already begun.[299] Wind Mobile explained that it was fully cooperating with the CRTC on the basis of "*its legitimate expectation that the review would be conducted in accordance with the* [CRTC]*'s established confidential bi-lateral process*."[300]

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294 **CWS-Campbell**, ¶ 18-19; **CWS-Dobbie**, ¶ 23.

295 **CWS-Dobbie**, ¶ 23.

296 **Exhibit C-011**, Letter from McCarthy Tétrault LLP to Stephen Millington, 3 April 2009.

297 **Exhibit C-094**, Letter from Michael Hennessy to Konrad W. von Finckenstein, 20 April 2009, p. 1.

298 **Exhibit C-095**, Letter from Jean Brazeau to Konrad W. von Finckenstein, 22 April 2009.

299 **Exhibit C-096**, Letter from Simon Lockie to Konrad W. von Finckenstein, 5 May 2009, p. 1.

300 **Exhibit C-096**, Letter from Simon Lockie to Konrad W. von Finckenstein, 5 May 2009, p. 1.

131. Wind Mobile noted that a public review would "*suddenly reverse* [the CRTC's] *long standing and clearly articulated practice of conducting Canadian ownership and control reviews* [under the Telecommunications Act] . . . *on a confidential and bi-lateral basis with the carrier in question*."[301] In Wind Mobile's view, the targeted and public review sought by Telus and Shaw "*would be highly discriminatory and contrary to the principles of administrative fairness*."[302]

132. That same month, to Wind Mobile and GTH's surprise, citing specifically the letters submitted by Telus and Shaw targeting Wind Mobile, the CRTC initiated a consultation process calling for comments "*on the circumstances under which it would be appropriate to hold a multi-party public process to review a common carrier's compliance with the Canadian ownership and control requirements*."[303]

133. At the conclusion of its consultation process, on 20 July 2009, the CRTC released "*a new framework with respect to Canadian ownership and control reviews under the* Telecommunications Act *and the* Canadian Telecommunications Common Carrier Ownership and Control Regulations."[304] Contrary to its past practice,[305] the CRTC now

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301 **Exhibit C-096**, Letter from Simon Lockie to Konrad W. von Finckenstein, 5 May 2009, pp. 2, 5-6.

302 **Exhibit C-096**, Letter from Simon Lockie to Konrad W. von Finckenstein, 5 May 2009, p. 2.

303 **Exhibit C-098**, CRTC, *Telecom Notice of Consultation CRTC 2009-303 – Call for comments – Canadian ownership and control review procedure under section 16 of the* Telecommunications Act, 22 May 2009, ¶¶ 1-2, 4; **CWS-Campbell**, ¶¶ 18-19; **CWS-Dobbie**, ¶ 25.

304 *See* **Exhibit C-012**, CRTC, *Telecom Regulatory Policy CRTC 2009-428: Canadian ownership and control review policy*, 20 July 2009 (emphasis in original).

305 *See* **Exhibit C-012**, CRTC, *Telecom Regulatory Policy CRTC 2009-428: Canadian ownership and control review policy*, 20 July 2009, ¶¶ 5, 8 (the CRTC acknowledging that "[i]*n the past, the [CRTC] has generally conducted ownership and control reviews on a confidential, bilateral basis, between the carrier under review and the* [CRTC]. *This type of review has normally not resulted in a public record or the release of public reasons*").

considered that conducting a public, multi-party process "*may in some instances provide substantive precedents and a level of much needed certainty to all industry players*."[306] On this basis, the CRTC's new review framework identified four tiers of review. Type 1 (the "[c]*onfidential, bilateral review*') was the typical confidential review process that had previously been the CRTC's norm, while Type 4 (the "[o]*ral, public, multi-party proceeding*") was the most intrusive, providing for a public review process whereby any part, including the Incumbents and other competitors, were provided the opportunity to inspect documents submitted by the entity under review, submit statements, and participate in oral proceedings.[307] The CRTC stated that Type 4 reviews would be taken only in "*exceptional circumstances*" while Type 1 reviews "*will continue to be the process most often employed*."[308]

134. That same day, the CRTC notified Wind Mobile that it would be subjected to a Type 4 review.[309] It scheduled a public hearing for 23 and 24 September 2009, and outlined the procedures to be followed by the public to participate in these proceedings, either in the written or the oral phases, and for Wind Mobile to respond to public comments.[310]

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306 *See* **Exhibit C-012**, CRTC, *Telecom Regulatory Policy CRTC 2009-428: Canadian ownership and control review policy*, 20 July 2009, ¶ 11.

307 *See* **Exhibit C-012**, CRTC, *Telecom Regulatory Policy CRTC 2009-428: Canadian ownership and control review policy*, 20 July 2009, ¶¶ 13-17.

308 *See* **Exhibit C-012**, CRTC, *Telecom Regulatory Policy CRTC 2009-428: Canadian ownership and control review policy*, 20 July 2009, ¶¶ 14, 17.

309 *See* **Exhibit C-013**, CRTC, *Telecom Notice of Consultation CRTC 2009-429: Notice of hearing – 23 September 2009, Gatineau, Quebec – Proceeding to consider the compliance of Globalive with the ownership and control regime*, 20 July 2009; **Exhibit C-014**, CRTC, *Telecom Notice of Consultation CRTC 2009-429-1: Notice of hearing – 23 September 2009, Gatineau, Quebec – Proceeding to consider the compliance of Globalive with the ownership and control regime, Erratum*, 21 July 2009.

310 *See* **Exhibit C-013**, CRTC, *Telecom Notice of Consultation CRTC 2009-429: Notice of hearing – 23 September 2009, Gatineau, Quebec – Proceeding to consider the compliance of Globalive with the ownership and control regime*, 20 July 2009, ¶¶ 4-19.

135. Prior to the oral hearing, Wind Mobile was given an indication of the CRTC's potential areas of concern through a series of interrogatories issued to Wind Mobile on 4 August 2009.[311] In an attempt to respond to the CRTC's potential concerns, Wind Mobile offered to make further changes to its corporate and loan documentation including to the corporate structure.[312] Wind Mobile made further changes in response to concerns expressed by the CRTC during the oral phase of the hearing.[313]

136. For the duration of the proceedings, Wind Mobile's competitors, including the Incumbents, vehemently contested Wind Mobile's status and argued that Wind Mobile did not satisfy the O&C Rules, raising in particular concerns regarding its foreign-sourced financing.[314]

137. On 29 October 2009, the CRTC concluded that Wind Mobile did not satisfy the O&C Rules contained in the Telecommunications Act and was therefore ineligible to operate as a telecommunications common carrier.[315] The lengthy decision acknowledged that the documents and structure were legally compliant; however, the CRTC concluded that Wind Mobile was "*controlled in fact by Orascom, a non-Canadian*."[316]

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311 *See* **Exhibit C-015**, CRTC, *Telecom Decision CRTC 2009-678: Review of Globalive Wireless Management Corp. under the Canadian ownership and control regime*, 29 October 2009, ¶ 12; **Exhibit C-016**, CRTC, *Telecom Decision CRTC 2009-678-1: Review of Globalive Wireless Management Corp. under the Canadian ownership and control regime, Erratum*.

312 *See* **Exhibit C-015**, CRTC, *Telecom Decision CRTC 2009-678: Review of Globalive Wireless Management Corp. under the Canadian ownership and control regime*, 29 October 2009, ¶ 15; **CWS-Dobbie**, ¶ 27.

313 *See* **Exhibit C-015**, CRTC, *Telecom Decision CRTC 2009-678: Review of Globalive Wireless Management Corp. under the Canadian ownership and control regime*, 29 October 2009, ¶ 31.

314 *See, e.g.*, **Exhibit C-015**, CRTC, *Telecom Decision CRTC 2009-678: Review of Globalive Wireless Management Corp. under the Canadian ownership and control regime*, 29 October 2009, ¶¶ 12-14.

315 **Exhibit C-015**, CRTC, *Telecom Decision CRTC 2009-678: Review of Globalive Wireless Management Corp. under the Canadian ownership and control regime*, 29 October 2009.

316 **Exhibit C-015**, CRTC, *Telecom Decision CRTC 2009-678: Review of Globalive Wireless Management Corp. under the Canadian ownership and control regime*, 29 October 2009, ¶¶ 33, 119.

138. The CRTC's decision came as a shock to GTH given Industry Canada's decision a few months earlier that Wind Mobile was in compliance with the identical O&C Rules applied by the CRTC.[317] The press and industry commentators were similarly incredulous.[318] Immediately after this decision, Mr. Campbell, on behalf of Wind Mobile wrote to the Minister of Industry, Tony Clement, to express his frustration with the decision. He explained:

> *This Decision presents an unacceptable (and in our view legally unjustified) set back to our plans to launch a new national wireless service this fall. It also frustrates the Government of Canada's policy decision to introduce real competition in the Canadian wireless sector.*[319]

139. By subjecting Wind Mobile to an unprecedented public review on the most onerous of terms, Canada gave the Incumbents every opportunity to seek to prejudice Wind Mobile and its investors from the outset. This was the very opposite of the environment portrayed to GTH when the Government was seeking to encourage its participation in the 2008 AWS Auction—at that time, the Government stressed that it was looking to relax the O&C Rules, knowing that they were a deterrent to potential foreign investors.

140. On 10 December 2009, the Canadian Government (Privy Council) overturned the CRTC's decision ("**Order in Council**"), and confirmed that Wind Mobile's structure was in fact

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317 **CWS-Dobbie**, ¶ 27. *See also* **CWS-Campbell**, ¶ 19.

318 *See e.g.*, **Exhibit C-105**, RBC Capital Markets, *Industry Comment: Telecommunication Services – Trick or Treat: CRTC Strikes Possible Deathblow to Globalive*, 30 October 2009; **Exhibit C-104**, Grant Robertson, *Globalive phone battle headed to cabinet*, THE GLOBE & MAIL, 29 October 2009, https://beta.theglobeandmail.com/globe-investor/globalive-phone-battle-headed-to-cabinet/article4297397/?ref=http://www.theglobeandmail.com& (last visited 24 September 2017); **Exhibit C-107**, Terence Corcoran, *How Ottawa can fix wireless mess: Third-worldish switch will cost Ottawa*, NATIONAL POST, 5 November 2009.

319 **Exhibit C-106**, Email from Ken Campbell to Khaled Bichara, et al., 31 October 2009, *attaching* Letter from Ken Campbell to the Honourable Tony Clement, 31 October 2009, p. 2.

compliant with Canadian law (as Industry Canada had found nine months earlier) and that Wind Mobile could commence its operations.[320]

141. Indeed, the unfairness of the process that Wind Mobile and GTH had been subjected to prompted the House Standing Committee on Industry, Science and Technology ("**INDU**") to pursue a study on Canada's foreign ownership rules and regulations in the telecommunications sector.[321] It requested representatives of Wind Mobile to appear before the INDU and speak on the issue, which its Chief Regulatory Officer, Simon Lockie, did on behalf of the company.[322] The results of the INDU's study and Parliament's subsequent relaxation of the O&C Rules is discussed further at Part V.C.1.

142. However, in January 2010, Public Mobile Inc., a New Entrant, supported by the Incumbents, appealed to the Canadian courts to overturn the Order in Council.[323] On 4 February 2011, the Federal Court (Trial Division) overturned the Order in Council, once again leaving Wind Mobile's future in jeopardy.[324] As described in one article by the Canadian Broadcasting Corporation ("**CBC**"), this decision "*plunge*[d] *new cellphone*

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320 **Exhibit C-017**, Order of the Privy Council and Schedule, P.C. 2009-2008, 10 December 2009.

321 **Exhibit C-110**, Email from Simon Lockie to Khaled Bishara, et al., 24 March 2010; **Exhibit C-112**, Standing Committee on Industry, Science and Technology, *Canada's Foreign Ownership Rules and Regulations in the Telecommunications Sector: Report of the Standing Committee on Industry, Science and Technology*, June 2010 (hereinafter "**INDU 2010 Report**"), Introduction, pp. 1-2.

322 **Exhibit C-110**, Email from Simon Lockie to Khaled Bishara, et al., 24 March 2010. *See also* **Exhibit C-112**, INDU 2010 Report, Appendix A – List of Witnesses, p. 48.

323 **Exhibit C-108**, *Public Mobile v. Attorney General of Canada, et al.*, Federal Court, Court file No. T-26-10, Notice of Application, 8 January 2010.

324 **Exhibit C-115**, *Public Mobile v. Attorney General of Canada, et al.*, Federal Court, Docket: T-26-10, Reasons for Judgment and Judgment, 2011 FC 130.

carrier Wind Mobile and the whole Canadian telecommunications market into chaos."[325] Adding to the frustration and confusion, was the fact that the decision came at a time when the Government was actively contemplating steps to relax or remove entirely the O&C Rules.[326] The CBC article concluded that something had to be done:

> *Not only is Wind's future at stake, the government also stands to lose much. In the span of a day,* [Prime Minister] *Harper and* [Industry of Canada Minister] *Clement went from being heroes hailed by consumers for standing up against usage-based billing, to giant goats for putting Wind, its investor and customers into an impossible situation.*[327]

143. In June 2011, the Federal Court's February 2011 decision was quashed by the Court of Appeal, following Wind Mobile and the Government's appeal of the decision. The Order in Council was restored.[328] Leave to appeal to the Supreme Court of Canada was denied in April 2012.[329] In other words, Wind Mobile and GTH could finally feel assured that the investment structure, the foundation on which GTH had made and continued to make its investment, was no longer at risk and that Wind Mobile could continue to operate in Canada.

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325 **Exhibit C-116**, Peter Nowak, *Conservatives must deal with telecom's festering foreign ownership problem*, CBC, 7 February 2011, http://www.cbc.ca/news/technology/conservatives-must-deal-with-telecom-s-festering-foreign-ownership-problem-1.1009489 (last visited 24 September 2017).

326 *See infra* Part V.C.1.a.

327 **Exhibit C-116**, Peter Nowak, Conservatives must deal with telecom's festering foreign ownership problem, CBC, 7 February 2011, http://www.cbc.ca/news/technology/conservatives-must-deal-with-telecom-s-festering-foreign-ownership-problem-1.1009489 (last visited 24 September 2017).

328 **Exhibit C-117**, *Globalive Wireless Management Corp. and Attorney General of Canada v. Public Mobile Inc. and Telus Communications Company*, Dockets: A-78-11 & A-79-11, Reasons for Judgment, 2011 FCA 194.

329 **Exhibit C-124**, *Public Mobile v. Globalive Wireless Management Corp. and Attorney General of Canada,* Judgment, 2012 SCC 34418. *See also* **Exhibit C-024**, *Globalive wins court battle over foreign control*, THE GLOBE & MAIL, 26 April 2012.

144. The CRTC review and the proceedings that followed caused Wind Mobile to waste valuable time and resources just at the time it was trying to build up its operations.[330] Ken Campbell explains that, where a telecom operator is competing against other New Entrants, it is essential to move quickly to gain a competitive first-mover advantage.[331] Until the issuance of the December 2009 Order in Council overturning the CRTC's decision, Wind Mobile was prohibited from commencing operations altogether.[332] This prohibition occurred at the critical start-up period for Wind Mobile, during which it was crucial for Wind Mobile to move quickly to gain a competitive advantage.[333] Wind Mobile's frustration at the time is captured in Mr. Campbell's letter to Minister Clement just after the CRTC's decision:

> *The CRTC made this determination despite clear evidence that there are no covenants or other levers of control related to that debt and despite evidence during the hearing (including from Rogers's own Treasurer) that it was not possible to obtain alternative sources of debt due to the global credit crisis. Accordingly, the CRTC made this determination, which is not required by law,* ***knowing that it could kill our business and totally undermine the Government's pro-competitive and pro-consumer spectrum policy. To our increased frustration, it made this determination without providing any guidance as to how the debt issue could be resolved to its satisfaction. The CRTC has also refused our informal requests that they provide such guidance.***
>
> *We are still assessing the CRTC's decision and have made no decisions on a response at this time. However, we can assure you that any further*

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330 **CWS-Campbell**, ¶ 20. *See also* **Exhibit C-101**, Letter from Michael J. O'Connor to Dean Del Mastro, 14 August 2009.

331 **CWS-Campbell**, ¶ 20 ("*In the context of the Canadian market at this time, New Entrants needed to move fast. Time is of the essence as scaling an operation quickly is required in order to achieve investment objectives and to gain an advantage over competitors that were also seeking to enter the market (so-called first-mover advantage).*").

332 **Exhibit C-106**, Email from Ken Campbell to Khaled Bichara, et al., 31 October 2009, *attaching* Letter from Ken Campbell to the Honourable Tony Clement, 31 October 2009; **CWS-Campbell**, ¶¶ 20-21.

333 **Exhibit C-106**, Email from Ken Campbell to Khaled Bichara, et al., 31 October 2009, *attaching* Letter from Ken Campbell to the Honourable Tony Clement, 31 October 2009; **CWS-Campbell**, ¶ 20.

> *regulatory delays in our plans to launch our service this fall will be extremely painful for our company, its shareholders, our 800 employees and Canadian consumers. Further delays will also have a chilling effect on future foreign investment, and discourage interest by foreign investors in consortia bidding in future spectrum auctions. Indeed, the prospective of our investors having a $500M+ investment effectively confiscated because of inconsistent and incoherent regulatory rulings will likely chill foreign investment throughout the Canadian telecommunications industry and beyond.*
>
> ***The CRTC's decision was, of course, applauded by the incumbent wireless carriers.*** *They have responded to the decision by immediately terminating all pre-launch technical plans and trials with us related to E-911, number portability and other interconnection arrangements that we need to operate our business.* ***They are clearly doing whatever they can to jeopardize our launch and your government's wireless competition policy.***
>
> *If the regulatory delays caused by the decision are serious, we will have no choice but to abort the launch, lay off staff and mothball our operations. Since we are the only national new wireless entrant and the only entrant prepared to launch now, such regulatory delays will also jeopardize the Government's AWS spectrum policy, which was clearly aimed at giving Canadian consumers and businesses greater competition, choice, innovation and better prices.*[334]

B. Canada Fails To Address Key Barriers To Market Entry In Contradiction of Prior Representations To Encourage Investment

145. In order to encourage new entry into the telecommunications market, Canada committed in its 2007 AWS Auction Policy Framework to facilitate a regulatory environment that would address and ameliorate certain key barriers to market entry.[335] As described above, two of the conditions Canada emphasized were access to fair roaming agreements with the Incumbents (especially given the substantial gaps in the New Entrants' network coverage)

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[334] **Exhibit C-106**, Email from Ken Campbell to Khaled Bichara, et al., 31 October 2009, *attaching* Letter from Ken Campbell to the Honourable Tony Clement, 31 October 2009 (emphases added); **CWS-Campbell**, ¶ 19.

[335] *See* **Exhibit C-004**, AWS Auction Policy Framework; **CWS-Connolly**, ¶¶ 11-13.

and access to the Incumbents' existing towers and sites at fair rates (given the substantial time and capital required to build their own towers and sites).[336] According to Industry Canada's Policy Framework, "*in the absence of these measures, there exists a potential that reliance on market forces alone may serve to unduly restrict market entry*."[337]

146. At the time of its investment, GTH understood that the Government would facilitate an environment which would allow New Entrants a chance of success by requiring that the Incumbents cooperate fairly with the New Entrants where necessary.[338] During an investors presentation that took place on 4 September 2008,[339] the telecommunications industry's expectations were made clear to Industry Canada, who attended this call:[340] "*roaming is in the end obligatory. It means* [that] *if we don't get to a conclusion amicably* [with the Incumbents] *in commercial terms, we can go to the Regulator and the Regulator will impose roaming. What* [the Incumbents] *can do is hold us back, delay us, but inevitably they will have to do it at a certain point in time; . . . . And there is also one other element, it's not just roaming; everybody should also realise that there is mandated site sharing as well*."[341]

147. As explained below, despite its assurances, Canada failed to ensure a fair and reasonable regulatory environment for the New Entrants.

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336 **CWS-Connolly**, ¶ 12.

337 **Exhibit C-004**, AWS Auction Policy Framework, p. 4.

338 **CWS-Campbell**, ¶¶ 8-10.

339 **Exhibit C-088**, JPMorgan, *Conference Call on Canada Transcript*, 4 September 2008.

340 **Exhibit C-089**, JPMorgan, *Conference Call on Canada Participant List*, 4 September 2008 (identifying "*Pamela King*" from "*Industry Canada Ottawa*" as a participant on the call).

341 **Exhibit C-088**, JPMorgan, *Conference Call on Canada Transcript*, 4 September 2008, p. 12.

1. Canada Ignored Repeated Requests To Enforce A Fair Regulatory Environment

148. Contrary to its representations during the 2008 AWS Auction, Canada's mandatory roaming and tower and site sharing were ineffectual and failed, in any meaningful way, to address these important barriers to entry.

149. With respect to roaming, Wind Mobile's negotiations with the Incumbents proved difficult and Wind Mobile failed to obtain the reasonable commercial rates it was expecting.[342] The absence of caps on prices or clarification regarding the definition of "*commercial rates . . . reasonably comparable to rates that are currently charged to others for similar . . . services*"—the standard imposed by the Framework—allowed the Incumbents to impose roaming agreements at exorbitant rates.[343]

150. Wind Mobile complained on numerous occasions to Canada regarding the hurdles it faced during its negotiations with the Incumbents.[344] For example, on 15 May 2009, Mr. Lockie, on behalf of Wind Mobile, wrote to Industry Canada to request clarification and direction concerning roaming.[345] Mr. Lockie explained the difficulties faced by the parties regarding the interpretation of the conditions and Wind Mobile's difficulties in ultimately obtaining reasonable terms.[346] For instance, at one point in time, Wind Mobile was paying Rogers approximately C$ 1000 per gigabyte of data for domestic wholesale roaming—whereas the

342 **CWS-Campbell**, ¶ 11.

343 **Exhibit C-067**, Mandatory Roaming & Tower/Site Sharing Notice, § 9(4)(a).

344 **CWS-Campbell**, ¶ 15.

345 **Exhibit C-097**, Letter from Simon Lockie to Peter Hill, 15 May 2009.

346 **Exhibit C-097**, Letter from Simon Lockie to Peter Hill, 15 May 2009.

retail rate to subscribers was around C$ 5 per gigabyte.[347] Wind Mobile was also forced to accept charges for inbound text messages when its subscribers were roaming. Mr. Lockie, Wind Mobile's Chief Regulatory Officer, later explained to the Canadian Senate:

> *The industry standard for any retail offering in Canada or the world, as far as I know is that no one charges for inbound text. We couldn't pass that charge on, so it cost us about $1 million a year to absorb those costs. We have about 200 roaming agreements globally. Of those, we have inbound text charges on only three of them: the Cuban government, a chain of cruise ships, and our domestic roaming agreement.*[348]

151. On 1 June 2009, Industry Canada responded by indicating that roaming services should be offered by the Incumbents wherever technically feasible.[349] Industry Canada stated that the difficulties otherwise faced by Wind Mobile should be dealt with through negotiations directly with Rogers; unhelpfully, it referred Wind Mobile to the GSM association guidelines and industry rates and practices. Industry Canada concluded that while it "*may provide clarifications on the existing conditions of license . . . Industry Canada will only formally rule on technical feasibility or potential breaches of the conditions of license.*"[350] Industry Canada explained that "[d]*isputes regarding the commercial aspects, terms or*

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[347] **Exhibit C-221**, *Proceedings of the Standing Senate Committee on Transport and Communications*, 41st Parliament, 2nd Session, Issue No. 7, 27 May 2014, 7:31 (Testimony of Mr. Lockie). *See also* **Exhibit C-213**, Wind Mobile, *Domestic Roaming: Presentation by Simon Lockie, Chief Regulatory Officer*, October 2013, Slide 5. Wind Mobile had no choice but to negotiate with Rogers because of its network was incompatible with that of the other Incumbents. *See* **CWS-Campbell**, ¶ 11; **Exhibit C-221**, *Proceedings of the Standing Senate Committee on Transport and Communications*, 41st Parliament, 2nd Session, Issue No. 7, 27 May 2014, 7:32 (Testimony of Mr. Lockie) ("*the only party that operated a GSM network, which is a network technology . . . was Rogers. The other two, Bell and TELUS, operated a CDMA network, which was not technologically compatible with our network*").

[348] **Exhibit C-221**, *Proceedings of the Standing Senate Committee on Transport and Communications*, 41st Parliament, 2nd Session, Issue No. 7, 27 May 2014, 7:32 (Testimony of Mr. Lockie).

[349] **Exhibit C-100**, Letter from Peter Hill to Simon Lockie, 1 June 2009.

[350] **Exhibit C-100**, Letter from Peter Hill to Simon Lockie, 1 June 2009, p. 3.

costs related to the roaming agreement should be dealt with through negotiations between the parties, and if necessary, the arbitration process as set out by Industry Canada."[351] But the arbitration process was time-consuming and the Incumbents made it clear they would dispute any claims owing to the imprecise nature of the Government's mandatory terms. Wind Mobile (and the other New Entrants) did not have the time to undertake a time-intensive, strongly contested arbitration proceedings at the critical time of its launch.[352] Wind Mobile had no commercial choice but to agree to the terms imposed by Rogers in order to provide service to subscribers in areas where it did not have any towers or coverage.[353] As Mr. Lockie would later explain:

> [T]*he negotiations were going so badly that we had no choice but to prepare for arbitration. We spent close to half a million dollars on experts and legal advisers preparing for arbitration. Ultimately, we just could not move forward. The primary reason was that we had to launch and roaming is absolutely critical to launching a wireless company. . . .* [T]*he possibility of a return on that primary investment* [in spectrum] *had already started—the clock was ticking.*[354]

152. Similarly, with respect to tower and site sharing, the Government's policy did not match what happened in reality. As Mr. Campbell explains:

> *When it came to tower and site sharing, the Incumbents refused to engage in good faith discussions. For example, when Wind Mobile submitted requests or inquiries to the Incumbents regarding tower sharing, the Incumbents would either not respond or seek to prolong any discussions*

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351 **Exhibit C-100**, Letter from Peter Hill to Simon Lockie, 1 June 2009, p. 3.

352 **Exhibit C-213**, Wind Mobile, *Domestic Roaming: Presentation by Simon Lockie, Chief Regulatory Officer*, October 2013 (Slide 2) ("*Mandatory roaming backed by commercial arbitration in the* [Conditions of License] *has not worked.*"); **CWS-Campbell**, ¶ 14.

353 **CWS-Campbell**, ¶ 12. Mobilicity, another New Entrant, faced similar obstacles. *See* **Exhibit C-228**, Quadrangle Litigation – Amended Statement of Claim, ¶ 98.

354 **Exhibit C-221**, *Proceedings of the Standing Senate Committee on Transport and Communications*, 41st Parliament, 2nd Session, Issue No. 7, 27 May 2014, 7:31 (Testimony of Mr. Lockie).

> *without achieving any result. The Incumbents knew that these delays would seriously impact a New Entrant's ability to launch with good network coverage, and stubbornly refused to negotiate with us in any meaningful way. I recall many requests for tower sharing were made by Wind Mobile to the Incumbents, and none was ultimately granted.*[355]

153. To ensure that Wind Mobile would be able to launch and to do so quickly, Wind Mobile's management realized that the only viable option was to build their own towers, even though, as Mr. Campbell explains, sharing towers would theoretically have been faster and less expensive if the Incumbents had not delayed negotiations.[356] While the time and financial cost associated with Wind Mobile having to build its own towers was substantial,[357] Wind Mobile needed to launch and to do so quickly.[358]

154. As with roaming, given the Incumbents' obstructive behavior, the prescribed arbitration regime was not a practical option for resolving disputes relating to tower and site sharing. As Mr. Campbell explains:

> *While the Government had created an arbitration mechanism to resolve any roaming or tower/site sharing disputes, the mechanism simply did not work. First, the arbitration process would have taken too long at a time when we needed to start operations as soon as possible. Second, if we had pursued arbitration in relation to every tower or site the Incumbents refused to share with us, we would have been involved in a vast number arbitration proceedings (likely hundreds). This was simply not practical.*[359]

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355 **CWS-Campbell**, ¶ 13.

356 **CWS-Campbell**, ¶¶ 9, 14.

357 **CWS-Campbell**, ¶ 9 (noting "*the substantial capital cost and time required to rollout new networks*" and that "[i]*nfrastructure, like towers and sites, not only require capital, but suitable areas to build new infrastructure can be difficult and time-consuming to secure, given administrative procedures as well as public concern for environmental, aesthetic and other considerations*").

358 **CWS-Campbell**, ¶ 7.

359 **CWS-Campbell**, ¶ 14.

155. As time went on, despite continued complaints to the Government by Wind Mobile and others, circumstances remained the same. According to Industry Canada's own statistics, as of December 2010, Wind Mobile was not able to negotiate sharing for a single one of its 146 towers.[360] In an internal July 2011 presentation, Industry Canada noted the following:

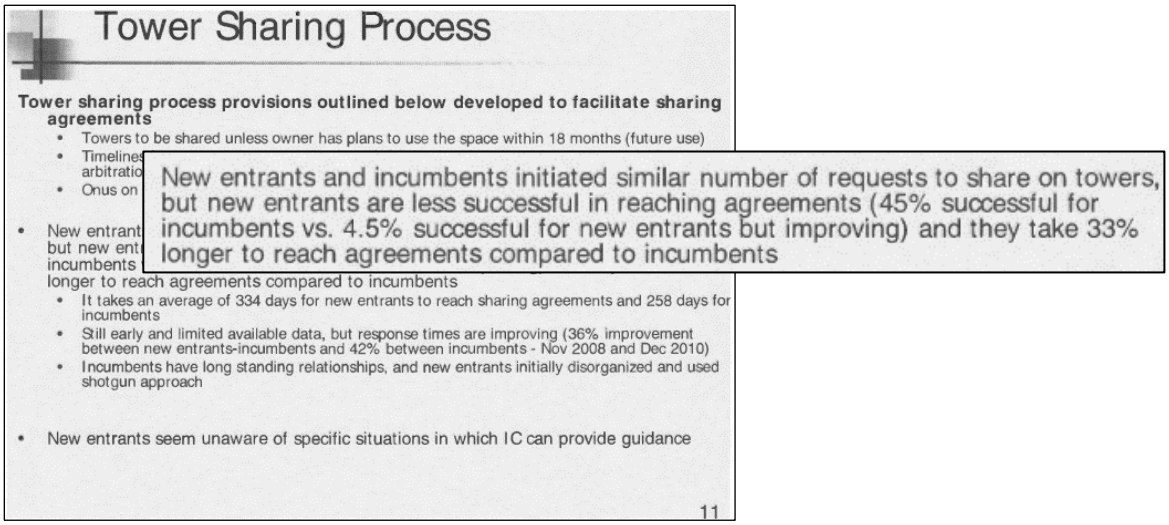

Figure 2: Slide 11 from an internal Industry Canada Presentation entitled "*Roaming and Tower Sharing Review*." **Exhibit C-118**, Industry Canada, Roaming and Tower Sharing Review, July 2011 [ATI Document], Slide 11.

156. Accordingly, Wind Mobile continued to seek the Government's assistance with the implementation of the regulatory scheme envisioned by the Framework,[361] and the Government appeared to appreciate the New Entrants' concerns. Indeed, in November 2010, the Minister of Industry announced that it would undertake a review of its roaming

[360] **Exhibit C-118**, Industry Canada, *Roaming and Tower Sharing Review* [ATI Document], Slide 25; **CWS-Campbell**, ¶ 13. Similarly, other New Entrants such as Mobilicity faced the same troubles. **Exhibit C-228**, Mobilicity Litigation – Amended Statement of Claim, ¶¶ 91-97.

[361] **CWS-Campbell**, ¶ 15.

and tower and site sharing policy.[362] By July 2011, Industry Canada had internally acknowledged that "[t]*ower sharing result was less successful than anticipated as agreements were initially slow in being reached—recommended next step is improved availability of data and clarification of rules.*"[363] Despite expressly acknowledging that the rules needed clarification in order to work, the Government was slow to act. It was not until March 2012, that the Government launched a public consultation to provide the opportunity to comment on proposed changes.[364] As discussed below, it would take another year for Canada to issue its policy decisions on roaming and tower and site sharing.

157. While Industry Canada was contemplating changes to the regulatory framework in order to achieve the objectives original set out in its 2008 AWS Auction Framework, Wind Mobile continued to press the Government to take action. On 11 January 2013, Wind Mobile's Chief Operating Officer, Pietro Cordova, and Mr. Lockie, met with the Minister of Industry, and other Government representatives to once again ask Canada to improve roaming and tower sharing conditions. Among other things, they explained that "[the AWS] *policy has not worked out the way it was intended*" and that "*the rate setting process . . . resulted in excessive roaming rates when compared to the rates WIND Mobile pays for wholesale US roaming*" and that the "[Incumbent-imposed] *exclusivity provisions . . . prevent price competition where alternatives exist*."[365] Wind Mobile explained to Industry

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362 *See* **Exhibit C-113**, Industry Canada, *News Release: Minister Clement Updates Canadians on Canada's Digital Economy Strategy*, 22 November 2010, http://www.ic.gc.ca/eic/site/064.nsf/eng/06096.html (last visited 24 September 2017).

363 **Exhibit C-118**, Industry Canada, *Roaming and Tower Sharing Review*, July 2011 [ATI Document], Slides 16-17.

364 **Exhibit C-121**, Industry Canada, *Proposed Revisions to the Frameworks for Mandatory Roaming and Antenna Tower and Site Sharing*, March 2012.

365 **Exhibit C-134**, *Issue Brief – Wind Mobile*, 11 January 2013, p. 3; **Exhibit C-133**, Wind Mobile, *WIND Mobile – Presentation to: Minister of Industry – By: Pietro Cordova, Chief Operating Officer and Simon Lockie, Chief*

Canada that: (*i*) voice air time charges paid to Rogers were two to three times the rate paid by Wind Mobile to T-Mobile, NewCore, and Cincinnati Bell in the U.S.; (*ii*) SMS outbound messages charges paid to Rogers were three times more expensive than the rates charged by Wind Mobile's U.S. roaming providers; and (*iii*) data roaming rates paid to Rogers were three to five times the rate paid by Wind Mobile to AT&T per megabyte.[366] Wind Mobile made a number of suggestions for improving the regulatory conditions. Among other things, it suggested: (*i*) capping of domestic wholesale roaming rates based on US roaming rate benchmarks; and (*ii*) prohibiting exclusivity provisions in roaming agreements.[367]

158. With respect to tower sharing, Wind Mobile explained that "*WIND Mobile initially encountered significant resistance by the incumbents to tower sharing* [which] *result*[ed] *in delays for WIND's initial roll-out and complaints to Industry Canada*" and that "*problems still persist with respect to future use reservations by the incumbents of prime tower elevations and high rates for co-location based on a commercial reasonableness standard as opposed to* [a] *cost based* [approach]."[368]

Regulatory Officer, 11 January 2013. Wind Mobile further highlighted that "*Rogers insisted on exclusivity provisions in its roaming agreement which mean*[t] *that* [Wind Mobile could not] *roam on any other networks domestically.*" **Exhibit C-134**, *Issue Brief – Wind Mobile*, 11 January 2013, p. 3.

366 **Exhibit C-134**, *Issue Brief – Wind Mobile*, 11 January 2013, p. 3. The data roaming rates paid by Wind Mobile were $750/GB in domestic roaming against $150/GB on average for US roaming but sharply declining. *See* **Exhibit C-213**, Wind Mobile, *Domestic Roaming: Presentation by Simon Lockie, Chief Regulatory Officer*, October 2013, Slide 5.

367 **Exhibit C-134**, *Issue Brief – Wind Mobile*, 11 January 2013; **Exhibit C-133**, Wind Mobile, *WIND Mobile – Presentation to: Minister of Industry – By: Pietro Cordova, Chief Operating Officer and Simon Lockie, Chief Regulatory Officer*, 11 January 2013.

368 **Exhibit C-134**, *Issue Brief – Wind Mobile*, 11 January 2013, p. 3; **Exhibit C-133**, Wind Mobile, *WIND Mobile – Presentation to: Minister of Industry – By: Pietro Cordova, Chief Operating Officer and Simon Lockie, Chief Regulatory Officer*, 11 January 2013. A cost-based approach would require rates to be set by reference to the actual costs to Incumbents.

159. Based on Mr. Cordova's internal report on the January 2013 meeting, it was clear that the Minister of Industry understood Wind Mobile's position and knew that the regime was not working out in accordance with the Government's expectations.[369] The Minister acknowledged that more needed to be done to promote competition by the New Entrants.[370]

160. In March 2013, Industry Canada announced its decisions to revise to its roaming and tower sharing policy.[371] This was four years after the AWS spectrum licenses were issued to Wind Mobile, almost as many years since Canada became aware that the roaming and tower sharing conditions were not working, and one year since the consultation process to address these conditions were announced. By contrast, it took Canada only three months to complete a consultation procedure to introduce a new transfer framework on the eve of the expiration of the five-year prohibition on transfer of set-aside spectrum licenses to Incumbents.[372]

161. On 27 May 2013, Wind Mobile met again with Industry Canada officials to reiterate its concerns regarding the regulatory environment and to highlight the need to improve the competitive environment.[373] Among other things, Wind Mobile suggested: (*i*) strictly regulated mandatory tower sharing and domestic roaming; (*ii*) "*roaming and tower sharing with reasonable terms and capped, cost-based wholesale rates*"; and (*iii*) the enforcement

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369 **Exhibit C-135**, Email from Pietro Cordova to Romano Righetti and Henk van Dalen, 12 January 2013.

370 **Exhibit C-135**, Email from Pietro Cordova to Romano Righetti and Henk van Dalen, 12 January 2013.

371 **Exhibit C-153**, Industry Canada, *Revised Frameworks for Mandatory Roaming and Antenna Tower and Site Sharing (DGSO-001-13)*, March 2013.

372 *See infra* Parts V.C.2.b and V.C.2.d.

373 **Exhibit C-187**, Wind Mobile, *Proposed Regulatory Changes to Support Fair and Effective Competition in Canada – Pietro Cordova, Chief Operating Officer, Simon Lockie, Chief Regulatory Officer*, 27 May 2013, Slide 5.

of applicable sanctions for non-implementation by Incumbents.[374] Wind Mobile also explained during the meeting that the Incumbents enjoyed a highly "*protected*" and favorable competitive position in Canada, allowing the creation of a nearly impenetrable oligopoly.[375] It added that circumstances made the Incumbents the only viable buyers for New Entrants upon the expiry of the five-year transfer prohibition.[376]

162. On 23 October 2013, Mr. Lockie met with representatives of Industry Canada to highlight once again its concerns regarding roaming and tower sharing.[377] In particular, he reiterated the concern that the applicable standard for determining rates, detailing that the phrase "*commercial rates that are reasonably comparable*" was "*too vague and subjective*."[378] Indeed, in an internal presentation from 2011, Industry Canada itself highlighted feedback from the ADR Institute—the body designated by Industry Canada to administer arbitrations relating to tower/site sharing and roaming—that "[s]*ome clarification to* [the] *rules would be helpful*."[379]

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374 **Exhibit C-187**, Wind Mobile, *Proposed Regulatory Changes to Support Fair and Effective Competition in Canada – Pietro Cordova, Chief Operating Officer, Simon Lockie, Chief Regulatory Officer*, 27 May 2013, Slide 10.

375 **Exhibit C-187**, Wind Mobile, *Proposed Regulatory Changes to Support Fair and Effective Competition in Canada – Pietro Cordova, Chief Operating Officer, Simon Lockie, Chief Regulatory Officer*, 27 May 2013, Slide 10. *See also* **Exhibit C-187**, Wind Mobile, *Proposed Regulatory Changes to Support Fair and Effective Competition in Canada – Pietro Cordova, Chief Operating Officer, Simon Lockie, Chief Regulatory Officer*, 27 May 2013, Slide 7.

376 **Exhibit C-187**, Wind Mobile, *Proposed Regulatory Changes to Support Fair and Effective Competition in Canada – Pietro Cordova, Chief Operating Officer, Simon Lockie, Chief Regulatory Officer*, 27 May 2013.

377 **Exhibit C-213**, Wind Mobile, *Domestic Roaming: Presentation by Simon Lockie, Chief Regulatory Officer*, October 2013.

378 **Exhibit C-213**, Wind Mobile, *Domestic Roaming: Presentation by Simon Lockie, Chief Regulatory Officer*, October 2013, Slide 2.

379 **Exhibit C-118**, Industry Canada, Roaming and Tower Sharing Review, July 2011 [ATI Document], Slide 15.

2. Canada Only Began To Address The Regulatory Environment When the Five-Year Rollout Period Neared Expiration

163. In mid-2013, the CRTC on its own initiative undertook a fact-finding exercise to assess the impact of wholesale roaming agreements on the competitiveness of the Canadian wireless industry.[380] Subsequently, in February 2014—more than five years after the 2008 AWS Auction—the CRTC initiated a second proceeding to determine whether the wholesale mobile wireless services market was sufficiently competitive and, if not, what regulatory adjustments were required.[381] In parallel, on 19 June 2014, the Canadian Parliament enacted Bill C-31, amending the Telecommunications Act to establish caps to prevent Canadian carriers from charging other Canadian carriers more for wholesale mobile wireless roaming services than they charged their own customers for mobile voice, data, and text services.[382]

164. In July 2014, the CRTC found that Rogers charged New Entrants higher rates than it charged other providers and that it improperly included exclusivity clauses in roaming agreements that prevented New Entrants from negotiating better rates or conditions with other carriers.[383] On that basis, the CRTC decided to ban the use of "*exclusivity clauses*"

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380 *See* **Exhibit C-225**, CRTC, *Telecom Decision CRTC 2014-398: Wholesale mobile wireless roaming in Canada – Unjust discrimination/undue preference*, 31 July 2014, ¶ 4.

381 **Exhibit C-225**, CRTC, *Telecom Decision CRTC 2014-398: Wholesale mobile wireless roaming in Canada – Unjust discrimination/undue preference*, 31 July 2014, ¶ 7; **Exhibit C-215**, CRTC, *Telecom Notice of Consultation CRTC 2014-76: Notice of hearing – 29 September 2014, Gatineau, Quebec – Review of wholesale mobile wireless services*, 20 February 2014.

382 *See* **Exhibit C-225**, CRTC, *Telecom Decision CRTC 2014-398: Wholesale mobile wireless roaming in Canada – Unjust discrimination/undue preference*, 31 July 2014, ¶ 8.

383 *See* **Exhibit C-225**, CRTC, *Telecom Decision CRTC 2014-398: Wholesale mobile wireless roaming in Canada – Unjust discrimination/undue preference*, 31 July 2014.

in roaming agreements between wireless carriers. Finally, on 5 May 2015, the CRTC adopted caps on wholesale roaming rates for GSM communications.[384]

165. However, by this point GTH was well on its way to negotiating a sale of its investment,[385] and Mobilicity was already in the middle of bankruptcy proceedings.[386] Mobilicity, reported that "*had the caps been in place when it launched it would have . . . 'been in a much healthier position'*."[387]

C. Canada Repudiates The 2008 AWS Auction Framework And Implements Measures That Destroy The Value Of GTH's Investment

166. Canada's failures with respect to the above required GTH to pursue several strategic avenues to sustain the Wind Mobile business and to preserve the value of its substantial investment. In the summer of 2012, given Canada's conduct, GTH began to contemplate seriously its options to exit the market and sell its interest in Wind Mobile, recalling that the set-aside spectrum licenses could be transferred to an Incumbent in March 2014 when the Five-Year Rollout Period expired.

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384 *See* **Exhibit C-232**, CRTC, *Telecom Regulatory Policy CRTC 2015-177: Regulatory framework for wholesale mobile wireless services*, 5 May 2015. Upon the adoption of this policy, Bill C-31 was repealed on 30 June 2015.

385 *See infra* Part V.C.2. After GTH sold its interest in Wind Mobile in September 2014, Wind Mobile continued to lobby the CRTC to cut the rates Incumbents charged New Entrants as these were still too high and "*far higher than what is just and reasonable*" despite the cap set in June by the Government. *See* **Exhibit C-227**, Christine Dobbie, *Wind Mobile wants incurred roaming rates reduced*, THE GLOBE & MAIL, 29 September 2014, https://beta.theglobeandmail.com/report-on-business/wind-mobile-wants-incurred-roaming-rates-reduced/article20850183/?ref=http://www.theglobeandmail.com& (last visited 24 September 2017).

386 *See* **Exhibit C-228**, Mobilicity Litigation – Amended Statement of Claim, ¶ 114.

387 **Exhibit C-227**, Christine Dobbie, *Wind Mobile wants incurred roaming rates reduced*, THE GLOBE & MAIL, 29 September 2014, https://beta.theglobeandmail.com/report-on-business/wind-mobile-wants-incurred-roaming-rates-reduced/article20850183/ (last visited 24 September 2017).

167. The summer of 2012 marked a turning point for GTH and Wind Mobile. First, Canada implemented the long-anticipated relaxation of the O&C Rules. Second, [redacted] These events triggered two significant opportunities for GTH: (*i*) GTH could now take full voting control over its investment and therefore control the future direction of Wind Mobile (including whether to remain in Canada, merge with another New Entrant, or sell to an Incumbent); and (*ii*) [redacted].

168. As set forth below, Canada denied GTH both of these significant opportunities, without reason and in direct contravention of GTH's expectations at the time of its investment.

1. Canada Relaxes The O&C Rules [redacted]

169. GTH sought to take advantage of a long-anticipated change to the O&C Rules which would allow GTH to take full voting control over its substantial investment in Canada. GTH's efforts, [redacted], are discussed below.

a. The Relaxation Of The O&C Rules

170. As discussed at Part III.B.7, at the time of GTH's participation in the 2008 AWS Auction and its investment in Canada, the O&C Rules contained in the Telecommunications Act and the Radiocommunication Regulations effectively prohibited GTH as a foreign company from acquiring voting control over Wind Mobile.

171. However, Canada recognized that such restrictions on foreign investment created a barrier towards increasing competition in the telecommunications market. In the lead up to (and during) the 2008 AWS Auction, Canada issued a number of studies and reports, all of which came to the conclusion that foreign investment restrictions in the telecommunications market should be relaxed. For example:

(a) **House of Commons Standing Committee on Industry, Science and Technology (2003)**: Upon a request by the Minister of Industry to review Canada's restrictions on foreign investment in telecommunications, the House of Commons Standing Committee on Industry, Science and Technology ("**INDU**") recommended that Canada remove all "*foreign ownership restrictions applicable to telecommunications common carriers*."[388]

(b) **Telecommunications Policy Review Panel (2006)**: Appointed by the Minister of Industry at the time, David Emerson, to conduct a review of Canada's telecommunications policy and regulatory framework, the Telecommunications Policy Review Panel ("**TPRP**") concluded "*that liberalization of the restrictions on foreign investment in Canadian telecommunications common carriers would increase the competitiveness of the telecommunications industry, improve the productivity of Canadian telecommunications markets, and be generally more consistent with Canada's open trade and investment policies*."[389]

On this basis, the TPRP recommended the relaxation of foreign investment restrictions in a two-phased approach: the first phase would grant the federal Cabinet authority to waive foreign ownership and control restrictions where it deems it would be in the public interest (with a presumption that approval for investments in new start-ups or in a carrier with less than 10% of the overall revenues in the market would be in the public interest); the second phase would be a "*broader liberalization of the foreign investment rules in a manner that treats all telecommunications common carriers including the cable telecommunications industry in a fair and competitively neutral manner*."[390]

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388 **Exhibit C-042**, House of Commons – Canada, *Opening Canadian Communications to the World – Report of the Standing Committee on Industry, Science and Technology*, April 2013, Conclusions, p. 55.

389 **Exhibit C-045**, TPRP Report, Executive Summary, p. 14. *See also* **Exhibit C-045**, TPRP Report, Afterword (Chapter 11), pp. 13-26.

390 **Exhibit C-045**, TPRP Report, Afterword (Chapter 11), pp. 25-26.

(c) **Competition Policy Review Panel (2008)**: The Competition Policy Review Panel ("**CPRP**"), announced by the Ministers of Industry and Finance to complete a review of Canada's competition and foreign investment policies, concurred with the TPRP's two-phased approach to the relaxation of foreign ownership restrictions in the telecommunications sector.[391]

172. The basic principle that the relaxation of restrictions on foreign investment would benefit the telecommunications industry was recognized in the framework documents for the 2008 AWS Auction. The 2007 AWS Auction Consultation issued by Industry Canada in February 2007 observed:

> *Foreign investment restrictions have the effect of limiting potential entry in the telecommunications market thereby reducing the competitive discipline that the threat of entry can provide. It is important to consider the effect this may have on the free operation of the market and the ability to rely solely on market forces in the forthcoming auction.*[392]

173. The final 2007 AWS Auction Policy Framework confirmed Canada's acknowledgment of the barriers caused by foreign investment restrictions, noting that such restrictions were being studied by the CPRP:

> *These* [O&C Rules] *ensure that Canada's telecommunications infrastructure is owned and controlled by Canadians. However they also act as restrictions on foreign investment which constitutes a barrier to market entry. The question of foreign ownership restrictions is being studied by the Competition Policy Review Panel. Removal or liberalization of these requirements would require legislative changes.*[393]

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391 **Exhibit C-076**, Competition Policy Review Panel, *Compete to Win: Final Report – June 2008*, June 2008, pp. 45-47.

392 **Exhibit C-050**, AWS Auction Consultation, § 2.5.1.

393 **Exhibit C-004**, AWS Auction Policy Framework, p. 3.

174. Realizing that there was a movement towards the liberalization of the O&C Rules, GTH deliberately included in the Articles of Incorporation and in the corporate agreements a provision which allowed GTH to convert its non-voting shares into voting shares should the O&C Rules change.[394] As discussed at Part V.A, these documents, including this provision, were scrutinized to a substantial degree by both Industry Canada and, thereafter, by the CRTC.

175. After a pause of almost three years, the Government's next step towards the relaxation of the O&C Rules took place with its March 2010 "*Speech from the Throne*."[395] In this Speech, the Government announced:

> *Our Government will open Canada's doors further to venture capital and to foreign investment in key sectors, including the satellite and telecommunications industries, giving Canadian firms access to the funds and expertise they need.*[396]

176. As described in Part V.A.2, the INDU initiated a review of foreign ownership in the telecommunications industry, triggered by the events that had taken place with respect to Wind Mobile and the inconsistent and duplicative ownership and control reviews. The INDU heard testimony from a variety of third-party representatives, including representatives from Wind Mobile, on the matter of foreign investment in the

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394 *See* **Exhibit C-064**, Email from Mike O'Connor to Investment Committee, et al., 28 February 2008, *attaching* RBC Capital Markets, *Canadian Wireless Spectrum Auction: Discussion Materials*, 11 January 2008 , Slide 22 ("*Equity ownership may be structured to allow foreign investors to take advantages of future changes in foreign ownership…*).

395 A Speech from the Throne is a speech made by the Governor General, as the Queen's representative in Canada, to the House of Commons and Senate Chamber outlining the Government's agenda at the opening of every new session of Parliament.

396 **Exhibit C-109**, House of Commons Debates, Hansard 145(1), 40th Parliament, 3rd Session, 3 March 2010, p. 4.

telecommunications industry.[397] Following these hearings, it issued a report entitled "*Canada's Foreign Ownership Rules and Regulations in the Telecommunications Sector*."[398] In this report, the INDU confirmed that this review was initiated as a direct result of the events that had taken place with the CRTC Review of Wind Mobile.[399] In considering the impact of lifting foreign ownership restrictions, it observed:

> *[F]oreign ownership restrictions disproportionally penalise new entrants and smaller players through their effect on the cost of capital; this in turn lowers the ability of new entrants and smaller players to pose a competitive threat to large incumbents. Moreover, foreign direct investment has, from a macro-economic perspective, benefits that could include increased productivity, increased competition and lower prices. Therefore, the economic case in favour of the removal of foreign ownership restrictions is clear.*[400]

177. Contemporaneously, Industry Canada initiated a consultation procedure with its paper "*Opening Canada's Doors to Foreign Investment in Telecommunications: Options for Reform*."[401] In this paper, Industry Canada presented three potential options for proceeding with the principle set in the March 2010 Speech from the Throne and with the aim of liberalizing foreign investment restrictions.[402] In sum, the options were: (*i*) amend Section 16 of the Telecommunications Act to decrease the minimum amount of voting shares that must be owned and controlled by Canadians from 80% to 51%; (*ii*) adopt part of the TPRP

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397 *See* **Exhibit C-112**, INDU 2010 Report, Introduction, pp. 1-2.

398 **Exhibit C-112**, INDU 2010 Report.

399 **Exhibit C-112**, INDU 2010 Report, Introduction, p. 1.

400 **Exhibit C-112**, INDU 2010 Report, Chapter 5 – Discussions and Recommendations, p. 41.

401 **Exhibit C-111**, Industry Canada, *Opening Canada's Doors to Foreign Investment in Telecommunications – Options for Reform Consultation Paper*, June 2010 (hereinafter "**2010 Foreign Investment Consultation**").

402 **Exhibit C-111**, 2010 Foreign Investment Consultation, Options for Reform, pp. 9-10.

and CPRP recommendation and amend the Telecommunications Act so that telecommunications common carriers with revenues of less than 10 percent of the total telecommunications market revenues would be exempt from Section 16 of the Telecommunications Act; or (*iii*) repeal Section 16 of the Telecommunications Act entirely.[403]

178. Following another lengthy pause, the long-anticipated relaxation of the O&C Rules arrived in June 2012. In the interim, on 4 October 2010, Wind Mobile had informed Industry Canada and the CRTC of a proposed transaction which would, among other things, result in a change of control at GTH from Weather Investments "*to a wider group comprising a combined Weather and VimpelCom*."[404] Thereafter, on 15 April 2011, Wind Mobile informed Industry Canada and the CRTC that its proposed transaction had now closed and "[a]*ccordingly, the majority owner of our non-Canadian shareholder, Orascom Telecom is now a wider group consisting of the combined WIND Telecom S.p.A. (formerly Weather Investments S.p.A.) and VimpelCom Ltd*."[405] Industry Canada did not raise national security concerns at this time.

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403 **Exhibit C-111**, 2010 Foreign Investment Consultation, Options for Reform, pp. 9-10.

404 **Exhibit C-019**, Email from Vanessa Brazil (on behalf of Ken Campbell) to Helen McDonald, 4 October 2010, *attaching* Letter from Ken Campbell to Helen McDonald, 4 October 2010; **Exhibit C-020**, Email from Vanessa Brazil (on behalf of Ken Campbell) to Konrad von Finckenstein, 4 October 2010, *attaching* Letter from Ken Campbell to Konrad von Finckenstein, 4 October 2010.

405 **Exhibit C-021**, Email from Vanessa Brazil (on behalf of Ken Campbell) to Helen McDonald, 15 April 2011, *attaching* Letter from Ken Campbell to Helen McDonald, 15 April 2011. *See also* **Exhibit C-022** Email from Vanessa Brazil (on behalf of Ken Campbell) to Konrad von Finckenstein, 15 April 2011, *attaching* Letter from Ken Campbell to Konrad von Finckenstein, 15 April 2011.

179. Citing the commitment made by the Government two years earlier in the March 2010 Speech from the Throne, on 14 March 2012, Minister Paradis issued the following announcement:

> *Today, I am announcing that we will be amending the Telecommunications Act. We will lift foreign investment restrictions for telecommunications companies that hold less than a 10-percent share of the total Canadian telecommunications market. This targeted action will remove a barrier to investment for the companies that need it most. It will allow these companies to gain further access to capital and expertise, so that they can continue to grow and compete—and better serve Canadian families and businesses. Access to spectrum is also an integral part of wireless companies' ability to compete and serve Canadians.*[406]

180. Three months later, on 29 June 2012, the Telecommunications Act was revised as follows:

> *16 (2) A Canadian carrier is eligible to operate as a telecommunications common carrier if*
>
> > *(a) it is an entity incorporated, organized or continued under the laws of Canada or a province and is Canadian-owned and controlled;*
> >
> > *(b) it owns or operates only a transmission facility that is referred to in subsection (5); or*
> >
> > *(c) it has annual revenues from the provision of telecommunications services in Canada that represent less than 10% of the total annual revenues, as determined by the Commission, from the provision of telecommunications services in Canada.*[407]

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406 **Exhibit C-123**, Industry Canada, *Speech: Speaking Points – The Honourable Christian Paradis, PC, MP Minister of Industry, Telecommunications Decisions*, 14 March 2012, https://www.canada.ca/en/news/archive/2012/03/telecommunications-decisions.html (last visited 24 September 2017). *See also* **Exhibit C-023**, Industry Canada, *Harper Government Takes Action to Support Canadian Families*, 14 March 2012; **Exhibit C-025**, *Liberalizing foreign ownership key to telecom sector: Paradis*, IPOLITICS, 29 May 2012.

407 **Exhibit C-026**, An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures, Bill C-38, S.C. 2012, 29 June 2012, p. 366.

181. Wind Mobile fell within category 16(2)(c), and GTH fully expected that it would be able to obtain full voting control over Wind Mobile,[408] and was an obvious beneficiary of this change in law.

b. [redacted] On Vague Unspecified "*National Security*" Grounds

182. This relaxation of the O&C Rules was a critical moment for GTH, and one that had long been anticipated since the outset of the investment. As discussed at Part IV.A, GTH had made the decision to partner with Globalive in part on the basis of its willingness to negotiate an agreement that would allow GTH to assume voting control if and when the O&C Rules changed. On 24 October 2012, GTHCL,[409] a company controlled and wholly owned indirectly by GTH,[410] submitted to the Investment Review Division of Industry Canada ("**IRD**") an application for the proposed acquisition of control of Wind Mobile through the conversion of its non-voting shares to voting shares—a right it had secured at

408 *See* **CWS-Dobbie**, ¶¶ 30-31.

409 [redacted]

410 [redacted]

the outset of its investment.[411]

183.

184. The provisions in the Investment Canada Act allowing a national security review of foreign investments had been added by Canada on 11 March 2009, just two days before the Wind Mobile's licenses were issued.[416] Sections 25.1 to 25.6 of the Investment Canada Act—"*Investments Injurious to National Security*"—now provided the Minister of Industry with

[416] **Exhibit C-009**, Investment Canada Act, R.S.C., 1985, c. 28 (1st Supp.) (hereinafter "**Investment Canada Act**"). *See also* **Exhibit C-102**, National Security Review of Investments Regulations, SOR/2009-271 (hereinafter "**National Security Review Regulations**").

the authority to conduct a review of any attempt to acquire control or any other investment by a "*non-Canadian*" in a Canadian business on the basis of alleged national security concerns.[417] The national security provisions of the Investment Canada Act prescribe a specific timeframe for such reviews. Specifically, it required that steps in the national security review process should be completed "*within the prescribed period*" and that the Minister must communicate all determinations under the process "*without delay*,"[418] acknowledging the importance of a speedy decision from the perspective of an investor.

185. [redacted]

[redacted]

[redacted]

[redacted]

417 **Exhibit C-009**, Investment Canada Act, §§ 25.1-25.6.

418 **Exhibit C-009**, Investment Canada Act, §§ 25.2-25.4. The "*prescribed periods*" are set out in the *National Security Review of Investments Regulations*. *See* **Exhibit C-102**, National Security Review Regulations.

419 [redacted]

[redacted]

186. [redacted]

187. [redacted]

[redacted]

188. GTH issued a press release announcing that GTH would be acquiring Mr. Lacavera's shares of Wind Mobile and that he would be stepping down as CEO and Chairman of Wind Mobile.[430]

189.

[430] **Exhibit C-140**, *Orascom Telecom to acquire AAL Corporation interest in WIND Mobile Canada; Anthony Lacavera to step down as CEO of WIND Mobile Canada, Plans to Launch Globalive Capital in 2013*, 18 January 2013.

190.

191. (discussed further in Part V.C.2 below).[437]

192. [redacted]

193. [redacted]

[redacted]

194. As discussed at Part V.C.2.b, Canada had just a few days earlier initiated its consultation to implement a new transfer framework applicable to spectrum licenses, in which it sought to block transfers which would result in "*undue spectrum concentration*."

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196.

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198.

199. [redacted]

200. [redacted]

201. [redacted]

202. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

203. [redacted]

204. [redacted]

[redacted]

205. [redacted]

206. [redacted]

[redacted]

207. [redacted]

208. [redacted]

[redacted]

2. GTH's Attempts To Sell Wind Mobile To An Incumbent Are Blocked By The Establishment And Implementation Of A New Transfer Framework

a. Incumbents Offer To Purchase Wind Mobile

209. In the autumn of 2011, given the substantial investment to date in Wind Mobile and its funding needs going forward, VimpelCom created a Project Team to review Wind Mobile's capital structure and strategic options for the future of the business, including [redacted][477]

210. From September 2011 through mid-2012, VimpelCom aggressively explored these options, in particular focusing on [redacted]

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475 **Exhibit C-197**, Letter John Knubley to GTH Global Telecom Holding (Canada) Limited, 18 June 2013.

476 **Exhibit C-205**, Letter Jo Lunder to Alexey M. Reznikovich, 27 July 2013 (emphasis added).

477 **Exhibit C-119**, Email from Andy Dry to Pietro Cordova, 11 October 2011.

[redacted][478] GTH and VimpelCom were aware that the five-year restriction on the transfer of set-aside spectrum licenses meant that GTH could not sell Wind Mobile to an Incumbent before March 2014.[479] However, VimpelCom and GTH likewise understood that this restriction would "*expire*[] *in 2014*," which "*opens the door to interested Canadian incumbents.*"[480] Incumbents, it was well known, would pay more for spectrum than other purchasers.[481] Given that during this period the March 2014 expiration date was years away, GTH and VimpelCom did not actively pursue options to exit the Canadian market at this time.[482]

211. [redacted]

[478] **CWS-Dry**, ¶ 7. *See also* **Exhibit C-120**, *VimpelCom: A fresh look at Globalive and Wind Canada*, 24 November 2011 (a presentation used gauge interest from potential third-party investors).

[479] **CWS-Dry**, ¶ 8. *See also* **Exhibit C-120**, *VimpelCom: A fresh look at Globalive and Wind Canada*, 24 November 2011.

[480] **Exhibit C-120**, *VimpelCom: A fresh look at Globalive and Wind Canada*, 24 November 2011, Slide 11.

[481] **CWS-Dry**, ¶ 14. *See also* **Exhibit C-120**, *VimpelCom: A fresh look at Globalive and Wind Canada*, 24 November 2011, Slide 11 (described that "[s]*carcity of spectrum and incumbent desire to gain market share* [was] *likely to drive premium valuation*.").

[482] **CWS-Dry**, n. 7.

[483] **Exhibit C-125**, Email from Andy Dry to Jo Lunder, et al., 17 May 2012, *attaching* [redacted]

[484] **Exhibit C-125**, Email from Andy Dry to Jo Lunder, et al., 17 May 2012, *attaching* [redacted]; **Exhibit C-126**, Email from Andy Dry to Jo Lunder, et al., 24 May 2012.

[redacted]

212. [redacted]

213. [redacted]

485 **Exhibit C-127**, Email from Andy Dry to Jo Lunder, et al., 30 May 2012.

486 **CWS-Dry**, ¶ 9.

487 **CWS-Dry**, ¶ 9; **Exhibit C-128**, Email from Carsten Revsbech to Jo Lunder, et al., 22 August 2012.

488 **Exhibit C-138**, Email from Stephen Lewis to Andy Dry, 14 January 2013.

489 **Exhibit C-139**, Email from Andy Dry to Henk van Dalen, 17 January 2013.

490 **Exhibit C-139**, Email from Andy Dry to Henk van Dalen, 17 January 2013.

[redacted]

214. [redacted][493] Up to this point, GTH had no reason to believe that the Government would bar a sale of the set-aside spectrum to an Incumbent after March 2014.[494]

215. [redacted], Shaw announced on 14 January 2013 that it had reached an agreement with Rogers for the sale of an option to purchase Shaw's set-aside licenses purchased during the 2008 AWS Auction.[495] This news, coupled with the announcement by Wind Mobile that Mr. Lacavera would be stepping down as CEO and Chairman,[496] prompted swift reaction in the industry. It was clear to those following the industry that market consolidation, *i.e.*, the purchase of New Entrants by Incumbents was inevitable. Scotiabank, for example, announced on 21 January 2013 that "*The Writing's on the Wall – The Canadian Wireless Market is Consolidating*."[497] In

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491 [redacted]

492 **CWS-Dry**, ¶ 12.

493 **CWS-Dry**, ¶ 12.

494 **CWS-Dry**, ¶ 12.

495 **Exhibit C-136**, *Shaw Announces Agreement With Rogers for Purchase and Sale of Assets*, 14 January 2013, http://www.marketwired.com/press-release/shaw-announces-agreement-with-rogers-for-purchase-and-sale-of-assets-tsx-sjr.b-1745530.htm (last visited 24 September 2017).

496 **Exhibit C-140**, *Orascom Telecom to acquire AAL Corporation interest in WIND Mobile Canada; Anthony Lacavera to step down as CEO of WIND Mobile Canada, Plans to Launch Globalive Capital in 2013*, 18 January 2013.

497 **Exhibit C-142**, Scotiabank, *Biweekly Report: Converging Networks: The Writing's on the Wall – The Canadian Wireless Market is Consolidating*, 21 January 2013.

addition to summarizing the Shaw-Rogers transaction, it observed that both Wind Mobile and Mobilicity, the strongest New Entrants in the market, were also rumored to be contemplating an exit and "*realize that the most lucrative deal is with the incumbents*."[498] This Rogers-Shaw deal faced fierce opposition from consumer groups, while commentators observed that Industry Canada's efforts to enable and sustain new entry in the wireless telecommunications market were likely, once again, to fail.[499]

b. Canada Announces Its 2013 Transfer Consultation

216. Nearly four years after the Wind Mobile's provisional set-aside spectrum licenses were issued and less than two months after news that Wind Mobile and other New Entrants were contemplating exiting the market by selling to an Incumbent, on 7 March 2013, Canada released its "*Consultation on Considerations Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences*" ("**2013 Transfer Consultation**").[500] The media reported that the Minister of Industry at this time, Christian Paradis, had initiated the 2013 Transfer Consultation after learning about the efforts of New Entrants to sell their set-aside spectrum licenses to Incumbents.[501] Sources for *The Globe and Mail* described

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498 **Exhibit C-142**, Scotiabank, *Biweekly Report: Converging Networks: The Writing's on the Wall – The Canadian Wireless Market is Consolidating*, 21 January 2013, p. 1.

499 *See e.g.*, **Exhibit C-143**, Jamie Sturgeon, *Consumer groups, rivals call on Ottawa to block $700M Rogers-Shaw Spectrum deal*, FINANCIAL POST, 22 January 2013, http://business.financialpost.com/technology/consumer-groups-rivals-call-on-ottawa-to-block-700m-rogers-shaw-spectrum-deal (last visited 28 September 2017); **Exhibit C-174**, Christine Dobby, *Why Ottawa faces lose-lose situation in bid to boost wireless competition*, 19 April 2013, NATIONAL POST, http://business.financialpost.com/technology/why-ottawa-faces-lose-lose-situation-in-bid-to-boost-wireless-competition.

500 **Exhibit C-152**, Industry Canada, *Consultation on Considerations Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences*, March 2013 (hereinafter "**2013 Transfer Consultation**"), ¶ 13.

501 **Exhibit C-171**, Rita Trichur & Boyd Erman, *Ottawa moving quickly to finalize wireless rules*, THE GLOBE & MAIL, 15 April 2013, https://beta.theglobeandmail.com/report-on-business/ottawa-moving-quickly-to-finalize-wireless-rules/article11197998/ (last visited 24 September 2017); **Exhibit C-166**, Rita Trichur, *Wireless carriers*

that "[h]*is objective is to ensure that any new rules are firmly in place long before a federal prohibition on incumbents purchasing new-entrant wireless licences expires next year*."[502]

217. In this Consultation, Canada requested comments on its "*propos*[al] *to revise CPC-2-1-23, which applies to all spectrum licences*"—*i.e.*, the 2007 Spectrum Licensing Procedure prevailing at the time of the 2008 AWS Auction—"*in order to indicate the specific criteria considered and process used when spectrum licence transfer applications are reviewed*."[503] The 2007 Spectrum Licensing Procedure had established that spectrum licenses purchased in an auction process, like the set-aside spectrum purchased during the 2008 AWS Auction, enjoyed the "*privilege . . . of enhanced transferability and divisibility rights*."[504]

218. Now, Canada proposed revising this existing procedure to incorporate a new two-step review process that would begin with an initial assessment by Industry Canada to determine "*whether a detailed review is required*."[505] Canada explained that this initial assessment would examine unspecified "*thresholds*," and involved "*taking into account the following factors*":

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sound alarm over Ottawa's spectrum transfer plan, THE GLOBE & MAIL, 4 April 2013, https://beta.theglobeandmail.com/report-on-business/wireless-carriers-sound-alarm-over-ottawas-spectrum-transfer-plan/article10766064/ (last visited 24 September 2017); **Exhibit C-200**, Alastair Sharp, *Canada to review all wireless spectrum transfer deals*, REUTERS, 28 June 2013, http://www.reuters.com/article/us-telecoms-spectrum/canada-to-review-all-wireless-spectrum-transfer-deals-idUSBRE95R0JQ20130628 (last visited 24 September 2017).

[502] **Exhibit C-171**, Rita Trichur & Boyd Erman, *Ottawa moving quickly to finalize wireless rules*, THE GLOBE & MAIL, 15 April 2013, https://beta.theglobeandmail.com/report-on-business/ottawa-moving-quickly-to-finalize-wireless-rules/article11197998/ (last visited 24 September 2017).

[503] **Exhibit C-152**, 2013 Transfer Consultation, ¶ 13.

[504] **Exhibit C-003**, Spectrum Licensing Procedure, § 5.6.

[505] **Exhibit C-152**, 2013 Transfer Consultation, ¶ 15.

> *(a) the amount of spectrum involved in the transfer; and/or*
>
> *(b) changes in levels of spectrum concentration and distribution among licensees in the region that would result from the transfer.*[506]

219. If Canada determined that a detailed review was necessary, it proposed to consider next whether the transfer would impact, among other things, "*the efficiency and competitiveness*" of the Canadian telecommunications market.[507] Moreover, Canada sought to implement notification requirements with respect to deemed transfers and prospective transfers of all spectrum licenses.[508]

220. The issuance of the 2013 Transfer Consultation was accompanied by a Government news release, touting that the "*Harper Government Puts Consumers First in Telecommunications Plan*," and a speech from Minister Paradis, during which he announced that "*our government is delivering on our promise to use the upcoming wireless spectrum auctions* ***to promote four competitors*** *in each region of the country*."[509] He added that the purpose of the 2013 Transfer Consultation was also aimed at achieving this objective.[510]

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506 **Exhibit C-152**, 2013 Transfer Consultation, ¶ 15.

507 **Exhibit C-152**, 2013 Transfer Consultation, ¶ 16.

508 **Exhibit C-152**, 2013 Transfer Consultation, ¶¶ 19, 25-28.

509 **Exhibit C-157**, Industry Canada, *News Release: Harper Government Puts Consumers First in Telecommunications Plan*, 7 March 2013, https://www.canada.ca/en/news/archive/2013/03/harper-government-puts-consumers-first-telecommunications-plan.html (last visited 24 September 2017) (emphasis added); **Exhibit C-156**, Industry Canada, *Speech: Speaking Points – The Honourable Christian Paradis, PC, MP, Minister of Industry, New measures to increase competition in the wireless sector*, 7 March 2013, https://www.canada.ca/en/news/archive/2013/03/new-measures-increase-competition-wireless-sector.html (last visited 24 September 2017). *See also* **Exhibit C-155**, Industry Canada, *Media Advisory: Minister of Industry Christian Paradis to Make Important Announcement*, 6 March 2013, https://www.canada.ca/en/news/archive/2013/03/minister-industry-christian-paradis-make-important-announcement.html (last visited 24 September 2017).

510 **Exhibit C-156**, Industry Canada, *Speech: Speaking Points – The Honourable Christian Paradis, PC, MP, Minister of Industry, New measures to increase competition in the wireless sector*, 7 March 2013, https://

221. This proposed new transfer policy was a shock to GTH and the industry given that it was a complete reversal of the prior transfer regime and its expectations.[511] Moreover, this fourth carrier policy was inconsistent with Canada's 2008 AWS Auction Framework, which contemplated that New Entrants might exit the market after five years.[512] The crux of the policy prevented any New Entrant from transferring its set-aside AWS licenses to an Incumbent potentially even after the Five-Year Rollout Period had expired. As Industry Canada stated in its internal "*secret*" December 2012 presentation, "*aside from the 5-year restriction on AWS spectrum, **there are no other specific conditions***."[513] Industry Canada was therefore aware, that this new transfer policy amounted to "***changing the current IC approach to licence transfer requests***."[514]

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www.canada.ca/en/news/archive/2013/03/new-measures-increase-competition-wireless-sector.html (last visited 24 September 2017) ("*we will review the policy on spectrum licence transfers with the objective of promoting competition in the wireless sector. To be clear, our government wants to see at least four players in each market*.").

511 **CWS-Dobbie**, ¶ 40; **CWS-Connolly**, ¶ 15. *See also* **Exhibit C-165**, Rogers, *Comments of Rogers Communications: Consultation on considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences (DGSO-002-13)*, 3 April 2013, ¶ 16 ("[i]*t would be inappropriate to apply the Department's proposals during the current term of spectrum licences that were acquired in an auction, since existing licensees **had no idea that the transferability of their licences would be subject to the proposed assessments when they initially acquired their spectrum licences**. For example, successful bidders that paid hundreds of millions of dollars for their licences in the 2008 AWS spectrum auction made these substantial investments in the absence of the proposed new rules which may make it more difficult to obtain approval for spectrum transfers*." (emphasis added)); **Exhibit C-178**, Rogers, *Reply Comments of Rogers Communications: Consultation on considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences (DGSO-002-13)*, 3 May 2013, ¶ 50 ("*The policy that was established in advance of the AWS auction clearly indicated that incumbents would be prohibited from acquiring set-aside spectrum **for a period of no more than 5 years from the time of licensing**. The Department could have set the restriction at 10 years or forever - but chose not to do so. This timeframe was arrived at after a full public consultation and careful deliberation by Industry Canada. Nowhere in the AWS auction policy is it stated that this prohibition might continue for a period of more than 5 years*." (emphasis added)).

512 *See supra* Part III.B.

513 **Exhibit C-131**, Email from Rebecca Guillemette to Cindy-Lee Cook, et al., 10 December 2012, *attaching* Industry Canada, *Wireless Telecommunications Sector: Status Update and Implications*, 10 December 2012 [ATI Document], Slide 14 (emphasis added).

514 **Exhibit C-131**, Email from Rebecca Guillemette to Cindy-Lee Cook, et al., 10 December 2012, *attaching* Industry Canada, *Wireless Telecommunications Sector: Status Update and Implications*, 10 December 2012 [ATI Document], Slide 14 (emphasis added).

222. In its December 2012 internal presentation, Industry Canada expressly acknowledged that these rules would: (*i*) limit the ability of Incumbents to acquire set-aside AWS spectrum, "***impact the 'value'***" of that spectrum; and (*ii*) for New Entrants "*reduce*[] *potential to sell spectrum in case of future exit*":

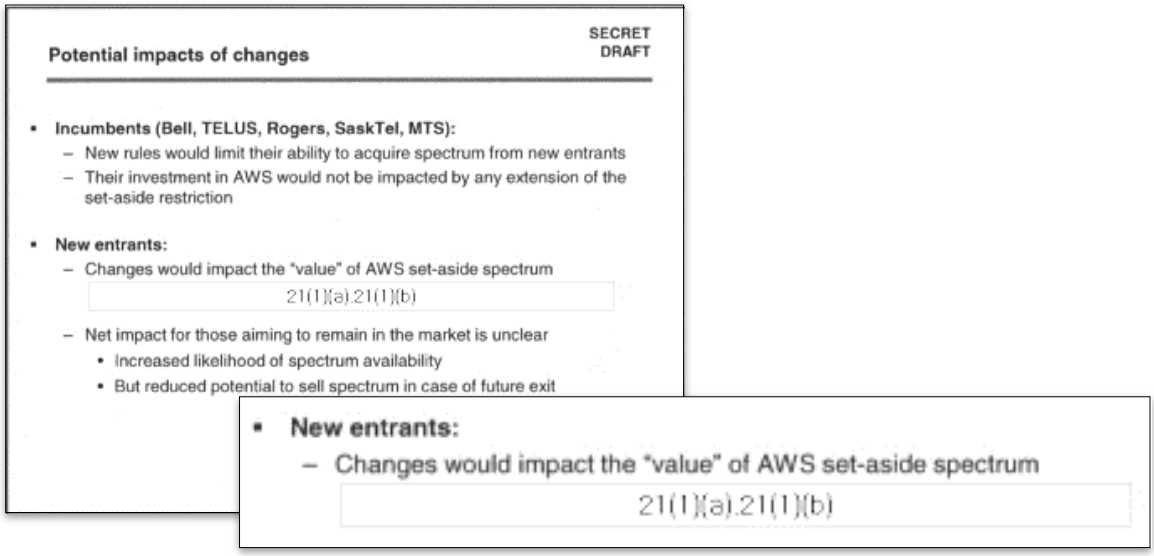

Figure 3: Slide 10 from an internal Industry Canada presentation describing the "*potential impacts*" of a change in transfer rights. **Exhibit C-131**, Email from Rebecca Guillemette to Cindy-Lee Cook, et al., 10 December 2012, *attaching* Industry Canada, *Wireless Telecommunications Sector: Status Update and Implications*, 10 December 2012 [ATI Document], Slide 17 (emphasis added).

c. The Negotiations With Incumbents Continue

223. One week after the release of the 2013 Transfer Consultation, on 14 March 2013, senior representatives of VimpelCom, including its CEO Jo Lunder, met with senior officials of Industry Canada, including Marta Morgan, Associate Deputy Minister of Industry Canada, in Ottawa. [redacted]

[redacted]

224. In the agenda, Canada requested that VimpelCom address the following:

> *Vimpelcom Executives to provide information about the plans for the Canadian business in the short, medium and long term, should the investment be allowed to proceed:*
>
> > *a. Would Vimpelcom plans be to stay in Canada and invest more in Globalive? What are the options being considered for the Canadian business?*
> >
> > *b. What is the internal decision making process at Vimpelcom for making decisions about its investment in Canada?*
> >
> > *c. What are the key considerations/factors affecting decisions about the Canadian business?*[516]

225. During this meeting, Mr. Lunder explained that, given the difficulties of the regulatory environment, GTH and VimpelCom had been exploring exit options to recover the value of GTH's investment.[517] [redacted] Canada informed GTH and VimpelCom's representatives that a sale of Wind Mobile to an Incumbent might pose challenges for

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[515] **Exhibit C-160**, Letter from Marie-Josée Thivierge to GTH Global Telecom Holding (Canada) Limited, 11 March 2013, *attaching Meeting at Industry Canada, March 14, 2013, 9:30am, Agenda*.

[516] **Exhibit C-160**, Letter from Marie-Josée Thivierge to GTH Global Telecom Holding (Canada) Limited, 11 March 2013, *attaching Meeting at Industry Canada, March 14, 2013, 9:30am, Agenda*.

[517] **CWS-Dobbie**, ¶ 37; **Exhibit C-162**, *Meeting with Industry Canada: Briefing Paper on Wind Canada's Business Situation*, 14 March 2013, pp. 7-8 ("***Decision to evaluate exit options has been made**: As a result of the uncertainties in the competitive and regulatory environment, VimpelCom and OTH have commenced an exploration of their exit options for Wind Canada*.").

[518] **CWS-Dobbie**, ¶ 37.

Canada from a policy perspective, but did not at this time inform its representatives that as sale to an Incumbent would be prohibited.[519]

226. [redacted]

227. Media speculation that GTH and VimpelCom might seek to sell Wind Mobile to an Incumbent made headline news.[524]

228. [redacted], Canada requested another meeting with senior representatives of VimpelCom to discuss VimpelCom's plans for the

519 **CWS-Dobbie**, ¶ 37.

520 **CWS-Dry**, ¶ 16.

[redacted]

524 *See, e.g.*, **Exhibit C-141**, Rita Trichur & Tim Kiladze, *Buyout of Wind Mobile exec changes telecom climate*, THE GLOBE & MAIL, 18 January 2013, https://www.theglobeandmail.com/globe-investor/buyout-of-wind-mobile-exec-changes-telecom-climate/article7514399/ (last visited 24 September 2017); **Exhibit C-164**, Rita Trichur et al., *Wind Mobile on block in new wireless shakeup*, THE GLOBE & MAIL, 21 March 2013, https://beta.theglobeandmail.com/report-on-business/wind-mobile-on-block-in-new-wireless-shakeup/article10062360/ (last visited 24 September 2017).

business.[525] On 12 April 2013, representatives of VimpelCom participated in a conference call with its external advisors and various members of the Canadian Government, including John Knubley (Director of Investments and Deputy Minister of Industry Canada) and Ms. Morgan.[526] During this meeting, Mr. Lunder confirmed that VimpelCom's preferred option was to exit the market and sell Wind Mobile to an Incumbent [redacted] At this point, Ms. Morgan informed VimpelCom's representatives that a sale of Wind Mobile to an Incumbent would not be attractive to Canada.[528] Mr. Lunder expressed that competition could be achieved in alternative ways and a fourth player was not necessary to achieve this objective.[529]

229. [redacted],[530] and the industry continued to forecast the sale of New Entrants to Incumbents.[531] One article observed that "[b]*y all indications*," Canada's brand new goal of having four players in the market was already "*on the brink of collapse*."[532] Research analysts described that if the Government in fact chose to block New Entrants (specifically Wind Mobile or Mobilicity) from selling their set-aside spectrum licenses to Incumbents, not only would this fail to contribute to

525 **Exhibit C-169**, Industry Canada, *Teleconference Agenda*, 12 April 2013.

526 **Exhibit C-169**, Industry Canada, *Teleconference Agenda*, 12 April 2013.

527 **CWS-Dobbie**, ¶ 38.

528 **CWS-Dobbie**, ¶ 38.

529 **CWS-Dobbie**, ¶ 38.

530 [redacted]

531 *See* **Exhibit C-176**, Email from Andy Dry to Carsten Revsbech, et al. (forwarding Financial Post article).

532 **Exhibit C-171**, Rita Trichur & Boyd Erman, *Ottawa moving quickly to finalize wireless rules*, THE GLOBE & MAIL, 15 April 2013, https://beta.theglobeandmail.com/report-on-business/ottawa-moving-quickly-to-finalize-wireless-rules/article11197998/ (last visited 24 September 2017).

sustained competition, but "*such denial would effectively take away the exit strategy and ability to recover some of their capital*."[533] Scotiabank observed that "[t]*his also would not help invite future investors given the regulatory uncertainty such a denial would create*."[534]

230. On behalf of Wind Mobile, Mr. Lockie stressed to Industry Canada that Canada could not simultaneously block exit from the market for a fair value (*i.e.*, sale to an Incumbent) while concomitantly refusing to implement the conditions necessary to allow New Entrants to maintain a viable business.[535] Mr. Lockie re-emphasized that Canada had caused substantial damage and loss of momentum as a result of its inaction.[536]

231. On 16 May 2013, Telus and Mobilicity announced an agreement for Telus to purchase Mobilicity and its set-aside spectrum licenses for C$ 380 million.[537] The press announced that market consolidation now appeared inevitable.[538] This confirmed that, in the industry's view, Canada's efforts to enable market entry with the 2008 AWS Auction had failed.[539]

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533 *See* **Exhibit C-158**, Scotiabank, *Industry Comment: Telecommunications and Cable – Canadian Wireless Myths and Facts*, 7 March 2013, p. 7.

534 *See* **Exhibit C-158**, Scotiabank, *Industry Comment: Telecommunications and Cable – Canadian Wireless Myths and Facts*, 7 March 2013, p. 7.

535 **CWS-Dry**, ¶ 15.

536 **CWS-Dry**, ¶ 15.

537 **Exhibit C-180**, Telus, *TELUS agrees to acquire Mobilicity*, 16 May 2013.

538 **Exhibit C-181**, Rita Trichur & Boy Erman, *Mobilicity deal puts Ottawa in a bind: Telus's $380-million agreement for upstart leaves government facing tough questions about its attempt to create competition*, THE GLOBE & MAIL, 17 May 2013.

539 **Exhibit C-181**, Rita Trichur & Boy Erman, *Mobilicity deal puts Ottawa in a bind: Telus's $380-million agreement for upstart leaves government facing tough questions about its attempt to create competition*, THE GLOBE & MAIL, 17 May 2013; **Exhibit C-183**, Rita Trichur, et al., *How Ottawa's plans to foster wireless competition sank*, THE GLOBE & MAIL, https://beta.theglobeandmail.com/report-on-business/how-ottawas-plan-to-foster-wireless-competition-sank/article12005826/ (last visited 24 September 2017). *See also* **Exhibit C-186**, House of Commons Debates, Hansard 146(256), 41st Parliament, 1st Session, p. 17039 (in which a representative declared that that Minister Paradis' "*wireless strategy* [was] *failing*").

232. [redacted]

233. Complicating matters, the 11 June 2013 deadline to apply for the upcoming 700 MHz spectrum auction was fast approaching.[542] If Wind Mobile applied to participate in the auction, the auction's anti-collusion rules would prevent Wind Mobile's representatives from speaking to another applicant for the duration of the auction period.[543] This meant that if the Incumbents applied for the auction (which was certain), [redacted] (or any other applicant) for that period.[544] [redacted]

234. On 29 May 2013, Mr. Lunder wrote to Minister Paradis summarizing the untenable position that Canada had created for GTH and VimpelCom.[546] He expressed that the "*regulatory framework has not provided sufficient support for new entrants*," and emphasized GTH's frustrations with Industry Canada's ongoing, opaque, and unreasonable national security review (discussed at Part V.C.1).[547] He explained:

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[540] [redacted]

[542] **CWS-Dry**, ¶18.

[543] **Exhibit C-154**, Industry Canada, *Licensing Framework for Mobile Broadband Services (MBS) – 700 MHz* Band (*DGSA-001-13*), March 2013 ("**700 MHz Auction Licensing Framework**"), § 5.4; **CWS-Dry**, ¶ 18.

[544] **Exhibit C-154**, 700 MHz Auction Licensing Framework, § 5.4; **CWS-Dry**, ¶ 18.

[545] **CWS-Dry**, ¶ 18.

[546] **Exhibit C-190**, Letter from Jo Lunder to The Hon. Christian Paradis, 29 May 2013.

[547] **Exhibit C-190**, Letter from Jo Lunder to The Hon. Christian Paradis, 29 May 2013, p. 2.

> *After investing* [C$] *1.8 billion in Wind Mobile, we are now in an unjustifiably difficult position.* [redacted]
>
> [redacted][548]

d. Canada Releases The 2013 Transfer Framework Effectively Prohibiting GTH's Sale Of Wind Mobile To An Incumbent

235. On 4 June 2013, Minister Paradis made an "*Important Announcement*."[549] While lauding efforts the Government had made since the 2008 AWS Auction "*to build a more competitive wireless sector*," Minister Paradis explained that Canada had "*launched a review of how the government considers licence transfer requests with the objective of promoting a more competitive environment*."[550] He stated that Canada's "*efforts are paying*

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548 **Exhibit C-190**, Letter from Jo Lunder to The Hon. Christian Paradis, 29 May 2013, p. 3 (emphasis added).

549 **Exhibit C-191**, Industry Canada, *Media Advisory: Minister of Industry Christian Paradis to Make Important Announcement*, 3 June 2013, https://www.canada.ca/en/news/archive/2013/06/minister-industry-christian-paradis-make-important-announcement.html (last visited 24 September 2017).

550 **Exhibit C-193**, Industry Canada, *Speech: Speaking Points – The Honourable Christian Paradis, PC, MP, Minister of Industry, Telecommunications Announcement*, 4 June 2013, https://www.canada.ca/en/news/archive/2013/06/telecommunications-announcement.html (last visited 24 September 2017).

off" and proclaimed that "*we **will not allow** this progress to be lost or undermined*."[551] With this introduction, Minister Paradis announced three significant decisions:

(a) **Canada had denied TELUS's application to obtain Mobilicity's AWS spectrum licenses**: "*These licences were specifically set aside for new entrants in the AWS auction. I have been clear. The Government has been clear. Spectrum set aside for new entrants was not intended to be transferred to incumbents. That is why we had to put in place restrictions on the transfers of the set-aside spectrum. That is why I will not be approving this—or any other—transfer of set-aside spectrum to incumbents ahead of the five-year limit*."[552]

(b) **The new, not yet published, spectrum license transfer policy**: "[G]*oing forward, proposed spectrum transfers—including AWS spectrum transfers—that will result in undue concentration and therefore reduce competition will not be permitted. . .* [the new transfer policy] *will give industry the clarity and predictability they need to chart the future of their companies*."[553]

(c) **The 700 MHz Auction**: "*In light of these decisions, the timing for the upcoming auction of 700 MHz spectrum will be updated. The application deadline will be September 17, 2013, and the auction will start on January 14, 2014. These new dates will provide companies with additional time to consider today's decisions and finalize their approaches to the auction process*."[554]

236. Minister Paradis concluded his announcement as follows:

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[551] **Exhibit C-193**, Industry Canada, *Speech: Speaking Points – The Honourable Christian Paradis, PC, MP, Minister of Industry, Telecommunications Announcement*, 4 June 2013, https://www.canada.ca/en/news/archive/2013/06/telecommunications-announcement.html (last visited 24 September 2017) (emphasis added).

[552] **Exhibit C-193**, Industry Canada, *Speech: Speaking Points – The Honourable Christian Paradis, PC, MP, Minister of Industry, Telecommunications Announcement*, 4 June 2013, https://www.canada.ca/en/news/archive/2013/06/telecommunications-announcement.html (last visited 24 September 2017). *See also* **Exhibit C-196**, Randall Palmer & Euan Rocha, *Canada blocks Telus deal for more wireless spectrum*, Reuters, 4 June 2013, http://www.reuters.com/article/uk-telecoms-canada/canada-blocks-telus-deal-for-more-wireless-spectrum-idUKBRE9531BG20130604 (last visited 24 September 2017).

[553] **Exhibit C-193**, Industry Canada, *Speech: Speaking Points – The Honourable Christian Paradis, PC, MP, Minister of Industry, Telecommunications Announcement*, 4 June 2013, https://www.canada.ca/en/news/archive/2013/06/telecommunications-announcement.html (last visited 24 September 2017).

[554] **Exhibit C-193**, Industry Canada, *Speech: Speaking Points – The Honourable Christian Paradis, PC, MP, Minister of Industry, Telecommunications Announcement*, 4 June 2013, https://www.canada.ca/en/news/archive/2013/06/telecommunications-announcement.html (last visited 24 September 2017).

> *But let me be clear—our government will not hesitate to use **any and every tool at our disposal** to:*
>
> - *protect consumers;*
> - *promote competition; and*
> - ***promote at least four wireless providers in every region** of the country.*[555]

237. Minister Paradis's announcement was summarized in a News Release entitled "*Harper Government Protecting Consumers and Increasing Competition in Canadian Wireless Sector*."[556] This News Release clarified that the new transfer policy "*will apply to all commercial mobile spectrum licences, including the 2008 AWS licences*."[557] The News Release further quoted Minister Paradis as stating: "*We are seeing Canadian consumers benefit from our policies and we will not allow the sector to move backwards. I will not hesitate to use **any and every tool at my disposal** to support greater competition in the market*."[558]

238. Minister Paradis reiterated before the House of Commons:

> *Mr. Speaker, today I announced that any proposed wireless transfer resulting in undue spectrum concentration and therefore less competition*

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[555] **Exhibit C-193**, Industry Canada, *Speech: Speaking Points – The Honourable Christian Paradis, PC, MP, Minister of Industry, Telecommunications Announcement*, 4 June 2013, https://www.canada.ca/en/news/archive/2013/06/telecommunications-announcement.html (last visited 24 September 2017) (emphasis added).

[556] **Exhibit C-194**, Industry Canada, *News Release: Harper Government Protecting Consumers and Increasing Competition in Canadian Wireless Sector*, 4 June 2013, https://www.canada.ca/en/news/archive/2013/06/harper-government-protecting-consumers-increasing-competition-canadian-wireless-sector.html (last visited 24 September 2017).

[557] **Exhibit C-194**, Industry Canada, *News Release: Harper Government Protecting Consumers and Increasing Competition in Canadian Wireless Sector*, 4 June 2013, https://www.canada.ca/en/news/archive/2013/06/harper-government-protecting-consumers-increasing-competition-canadian-wireless-sector.html (last visited 24 September 2017).

[558] **Exhibit C-194**, Industry Canada, *News Release: Harper Government Protecting Consumers and Increasing Competition in Canadian Wireless Sector*, 4 June 2013, https://www.canada.ca/en/news/archive/2013/06/harper-government-protecting-consumers-increasing-competition-canadian-wireless-sector.html (last visited 24 September 2017) (emphasis added).

> *will not be approved.* ***Spectrum set aside for new entrants was never intended to be transferred to incumbents and as such will not be approved now, nor will it likely be in the future****.*
>
> *Our Conservative government will not hesitate to use* ***any and every tool at its disposal*** *to support greater competition in the market and protect Canadian consumers.*[559]

239. Canada released the 2013 Transfer Framework on 28 June 2013, only three-and-a-half months after the consultation was initiated.[560] In describing the release of the 2013 Transfer Framework, Minister Paradis announced:

> *The Harper Government is committed to promoting at least four wireless providers in every region of the country to support greater competition in the market. . . The Harper Government will not hesitate to* ***use any and every tool at its disposal*** *to protect Canadian consumers and to promote competition.*[561]

240. The 2013 Transfer Framework was, Canada explained, intended "*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*."[562] On the alleged basis that "[u]*ndue concentration of spectrum among a small number of wireless service providers can be detrimental to competition*,"[563] Canada announced that

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559 **Exhibit C-195**, House of Commons Debates, Hansard 146(262), 41st Parliament, 1st Session, 4 June 2013, p. 17647 (emphases added).

560 **Exhibit C-031**, Industry Canada, *Framework Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences for Commercial Mobile Spectrum (DGSO-003-13)*, June 2013 (hereinafter "**2013 Transfer Framework**").

561 **Exhibit C-199**, Industry Canada, *News Release: Harper Government Releases Spectrum Licence Transfer Framework*, 28 June 2013, ttps://www.canada.ca/en/news/archive/2013/06/harper-government-releases-spectrum-licence-transfer-framework.html (last visited 24 September 2017) (emphasis added)

562 **Exhibit C-031**, 2013 Transfer Framework, ¶ 8.

563 **Exhibit C-031**, 2013 Transfer Framework, ¶ 9.

a central factor it would consider when considering a transfer application, was "*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*."[564] In addition to enumerated factors, this new framework described that the Minister could take into account "***any other factors*** *relevant to the policy objectives outlined in this Framework that may arise from the Licence Transfer*."[565] As would become clear to GTH, the purpose of this policy was to allow Canada to block transfers of spectrum to an Incumbent for any reason.[566]

241. As part of its new policy, Canada "*encourage*[d] *potential Applicants to seek informal, non-binding advice prior to requesting a transfer of spectrum licence*."[567] This way, the Government could privately forewarn parties about its decision to allow or not allow a particular transfer without having to face the public scrutiny associated with an official decision.

242. Shortly thereafter, Canada revised its 2007 Spectrum Licensing Procedure prevailing at the time of the 2008 AWS Auction. In its new "*Licensing Procedure for Spectrum Licences for Terrestrial Services*" ("**2013 Spectrum Licensing Procedure**"), Canada revised the language "*to update provisions relating to the transfer, division and subordinate licensing*

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564 **Exhibit C-031**, 2013 Transfer Framework, ¶ 39.

565 **Exhibit C-031**, 2013 Transfer Framework, ¶ 40(h).

566 *See, e.g.*, **Exhibit C-217**, Memorandum from Michael Horgan to Minister of Finance, *Meeting with representative from Rogers Communications*, 3 March 2014 [ATI Document], p. 2 ("*Prohibiting the transfer of spectrum set aside for new entrants in the 2008 AWS auction to incumbents (e.g., Rogers, Bell and TELUS) prior to the end of the five-year moratorium. The moratorium expired in February 2014, but the Government still retains the authority to block the sale of spectrum purchased through this auction to an incumbent carrier*.").

567 **Exhibit C-031**, 2013 Transfer Framework, ¶ 36.

of commercial mobile spectrum."[568] In incorporating the 2013 Transfer Framework into this new 2013 Spectrum Licensing Procedure, Canada revised its policy statement on enhanced transferability:

> ~~*To*~~ *In order to meet the policy goals of the* ~~*Department*~~ *Government, the spectrum licences assigned under the different licensing processes may not have the same privileges. One such privilege is that of the enhanced transferability and the divisibility rights accorded to spectrum licences* ~~*assigned through an auction*~~*. These 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 review and approval by Industry Canada, as set out in this document and in other* ~~*applicable*~~ *regulatory requirements. The 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.*

Figure 4: Comparison between § 5.6 of the 2013 Spectrum Licensing Procedure and the 2007 Spectrum Licensing Procedure. *See* **Exhibit C-206**, 2013 Spectrum Licensing Procedure, § 5.6; **Exhibit C-003**, Spectrum Licensing Procedure, § 5.6.

243. In retrospect, the release of the 2013 Transfer Framework was the death-knell to GTH's attempts to sell Wind Mobile to an Incumbent. As described below, while GTH and the Incumbents would continue to attempt to negotiate a transaction which would withstand Canada's new framework, Canada ultimately prohibited all further attempts by GTH to sell Wind Mobile to an Incumbent.

[568] **Exhibit C-206**, Industry Canada, *Licensing Procedure for Spectrum Licences for Terrestrial Services (CPC-2-1-23, Issue 3)*, August 2013 (hereinafter "**2013 Spectrum Licensing Procedure**"), Prefacie, p. i.

D. Owing To The Wrongful Acts Committed By Canada, GTH Is Left With No Commercially Reasonable Alternative Other Than To Exit The Canadian Market

244. Over the course of two weeks in June 2013, Canada simultaneously: (*i*) [redacted]; and (*ii*) changed its existing policy to prevent the sale of Wind Mobile to an Incumbent. It was becoming abundantly clear that GTH and its shareholders could no longer continue spending millions of dollars a month in an investment which [redacted], nor sell to a purchaser willing to pay the highest value for the investment.[569]

245. [redacted]

246. [redacted], the Incumbents were quick to target large foreign investors, [redacted], with hostile marketing campaigns and

[569] This was underlined by the fact that GTH was dependent on shareholder loans from VimpelCom for the continued funding of Wind Mobile.

[570] **CWS-Dry**, ¶ 24. *See* **Exhibit C-201**, Email from Carsten Revsbech to Andy Dry, et al., 13 July 2013, [redacted]

smear tactics in order to garner public support against their entry.[573] Ultimately, this aggressive strategy and the general investment climate in Canada at the time deterred [redacted] from investing in the Canadian market, [redacted]

247. [redacted]

248. The revised 17 September 2013 deadline to apply for the 700 MHz Auction was fast approaching. [redacted]

[573] *See, e.g.*, **Exhibit C-204**, Email from Victor Hwei to Carsten Revsbech, et al., 25 July 2013, *attaching* Bell, *Wireless policy loopholes hurt Canada and Canadians*, July 2013, and Bell, *An open letter to all Canadians*; **Exhibit C-207**, Ian Austen, *Flares in Canada at the Thought of Verizon*, NY TIMES, 1 August 2013, https://bits.blogs.nytimes.com/2013/08/01/flares-in-canada-at-the-thought-of-verizon/?mcubz=1&_r=0 (last visited 24 September 2017).

[574] *See, e.g.*, **Exhibit C-209**, *Verizon not entering Canada's wireless market after all*, CBC, 2 September 2013, http://www.cbc.ca/news/business/verizon-not-entering-canada-s-wireless-market-after-all-1.1339361 (last visited 24 September 2017).

[575] **CWS-Dry**, ¶ 24.

[576] **CWS-Dry**, ¶ 24, n. 32.

[577] **CWS-Dry**, ¶ 24.

[578] *See* **CWS-Dry**, ¶ 25; **Exhibit C-210**, Email from Andy Dry to Danny Hakker, et al., 5 September 2013, *attaching* [redacted] **Exhibit C-211**, Email from Carsten Revsbech to Alexey Reznikovich, et al, 5 September 2013.

249. [redacted]

250. [redacted]

251. Wind Mobile filed to participate in the 700 MHz auction to preserve its options (and value), while GTH and VimpelCom considered whether there was a reasonable basis to fund the acquisition of additional spectrum.[584]

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579 *See* **Exhibit C-211**, Email from Carsten Revsbech to Alexey Reznikovich, et al, 5 September 2013; **CWS-Dry**, ¶ 25.

580 *See* **Exhibit C-211**, Email from Carsten Revsbech to Alexey Reznikovich, et al, 5 September 2013; **CWS-Dry**, ¶ 25.

581 **CWS-Dry**, ¶ 25. *See* **Exhibit C-212**, Email from Carsten Revsbech to Jo Lunder and Augie K. Fabela, 12 September 2013.

582 **CWS-Dry**, ¶ 25. *See* **Exhibit C-212**, Email from Carsten Revsbech to Jo Lunder and Augie K. Fabela, 12 September 2013.

583 **CWS-Dry**, ¶ 25. *See* **Exhibit C-212**, Email from Carsten Revsbech to Jo Lunder and Augie K. Fabela, 12 September 2013.

584 **CWS-Dry**, ¶ 27.

252. In November 2013, representatives of GTH and VimpelCom met with representatives of the Prime Minister's Office and Industry Canada.[585] During that meeting, Government representatives once again made clear that there was no path to allowing GTH and VimpelCom to control the business and that the Government would not allow GTH to transfer Wind Mobile's spectrum licenses to Incumbents after the Five-Year Rollout Period.[586] Essentially, GTH had been cornered and had virtually no options remaining.

253. In January 2014, given the inability to take control over Wind Mobile, Wind Mobile withdrew from the 700 MHz Auction.[587]

254. Canada was aware that GTH and VimpelCom were unwilling to fund Wind Mobile's participation in the 700 MHz Auction because of the Government's refusal to allow them to take control of their investment. In an internal presentation, Industry Canada noted:

[redacted]

585 **CWS-Dry**, ¶ 28.

586 **CWS-Dry**, ¶ 28.

587 **CWS-Dry**, ¶ 30. Canada was aware that this was the cause of Wind Mobile's withdrawal from the Auction. **Exhibit C-218**, Industry Canada, *Advice to the Minister*, 17 March 2014, *Wireless Telecom – Status Update (As of March 14, 2014)* [ATI Document] ("*Vimpelcom's ability to take control of Wind remained in the spotlight during their March 6 investor call, where they announced that they had written off their 768 million dollar investment in Canada, and that it withdrew from the 700 MHz auction due their inability to take control of Wind Canada*.").

588 **Exhibit C-218**, Industry Canada, *Advice to the Minister*, 17 March 2014, *Wireless Telecom – Status Update (As of March 14, 2014)* [ATI Document] (emphasis added).

255. VimpelCom further determined that the decision to continue funding GTH's investment in Wind Mobile would depend on, among other conditions, whether GTH could take full legal control over its investment.[589] After exploring its strategic options in April 2014, [redacted]

256. During this period, Industry Canada monitored Wind Mobile's development with great interest, reporting developments with respect to Wind Mobile in frequent internal "*Wireless Telecom – Status Update*" reports[591] and discussing internally GTH's and VimpelCom's plans for the business.[592]

257. GTH and VimpelCom ultimately decided that their only logical option was to sell the business. Mr. Dry summarizes the position as follows:

> *Ultimately, in January 2014, the inability to take control over Wind Mobile resulted in a decision to . . . focus on potential exit paths. VimpelCom and GTH were understandably unwilling to invest any further funds into Canada given Canada's hostile reaction to them as investors, Canada's*

589 **CWS-Dry**, ¶ 30.

590 **CWS-Dry**, ¶ 30.

591 *See, e.g.*, **Exhibit C-218**, Industry Canada, *Advice to the Minister*, 17 March 2014, *Wireless Telecom – Status Update (As of March 14, 2014)* [ATI Document]; **Exhibit C-216**, Industry Canada, *Advice to the Minister*, 28 February 2014, *Wireless Telecom – Status Update (As of February 28, 2014)* [ATI Document].

592 **Exhibit C-220**, Email from Christopher Johnstone to Iain Stewart and Pamela Miller, 14 May 2014 [ATI Document]; **Exhibit C-222**, Email from Peter Hill to Lynne Fancy, 16 June 2014, *attaching Call with VimpelCom – June 16, 2014*.

> *pattern of treatment towards GTH's investment, and the lack of a viable path to recover the invested value of the business.*[593]

258. Wind Mobile kept Industry Canada apprised of its options and negotiations given Industry Canada's new requirement that any transaction should be approved by Industry Canada before an agreement was made.[594] In its internal notes, Canada recorded among its "*Important Dates*" that on 12 March 2014, "*WIND's AWS licence prohibition on transferring spectrum to incumbents expired*."[595] Of course, the "*expiration*" of the transfer prohibition no longer mattered as a practical matter in view of the Government's new 2013 Transfer Framework.

259. On 15 September 2014, GTH approved the sale of its entire shareholding in Wind Mobile to a consortium led by AAL Acquisitions Corp. (the "**AAL Consortium**").[596] GTH received almost nothing (only C$ 11), in a transaction in which the AAL Consortium agreed to acquire approximately C$ 135 million worth of debt owed to VimpelCom as well

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[593] **CWS-Dry**, ¶ 30.

[594] **Exhibit C-222**, Email from Peter Hill to Lynne Fancy, 16 June 2014, *attaching Call with VimpelCom – June 16, 2014* [ATI Document] ("*WIND must seek approval for a sale under the transfer policy* **before** *any agreement takes effect. Implementing a change in control (E.g. 'Closing' the deal) without IC approval would be a breach of conditions of licence.*" (emphasis in original)).

[595] *See* **Exhibit C-218**, Industry Canada, *Advice to the Minister*, 17 March 2014, *Wireless Telecom – Status Update (As of March 14, 2014)* [ATI Document]; **Exhibit C-216**, Industry Canada, *Advice to the Minister*, 28 February 2014, *Wireless Telecom – Status Update (As of February 28, 2014)* [ATI Document].

[596] [redacted]

as C$ 160 million in vendor loans.[597] This sale was approved by Industry Canada in November 2014.[598]

E. After GTH's Forced Exit, Canada Facilitates Wind Mobile's Sale To Shaw

260. Two months after GTH its shareholding in Wind Mobile to the AAL Consortium, Industry Canada released its policy framework for the auction of AWS-3 spectrum licenses (the "**AWS-3 Auction**"), in which it set-aside certain spectrum for bidding only by New Entrants.[599] At the AWS-3 Auction, Wind Mobile was the only bidder for set-aside spectrum licenses in its operation area and was able to purchase those licenses for the minimum bid price.[600]

261. On 24 June 2015, Industry Canada approved two transfers of set-aside spectrum licenses to Rogers. First, Canada approved Rogers' purchase of Shaw's set-aside spectrum licenses. As a requirement for the transaction to proceed, Industry Canada required Rogers to: (*i*) retain only Shaw's 20 MHz licenses across British Columbia and Alberta; and (*ii*) transfer the remainder of that spectrum to Wind Mobile and its new Canadian owners.[601] Second,

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[597] **CER-Dellepiane/Spiller**, ¶ 40.

[598] **Exhibit C-229**, Industry Canada, *Deemed Transfer of Spectrum Licences held by Globalive Wireless Management Corp. (GWMC), operating as WIND Mobile, to AAL Acquisitions Corp.*, 4 November 2014, http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf10890.html (last visited 24 September 2017), 4 November 2014.

[599] **Exhibit C-230**, Industry Canada, *Technical, Policy and Licensing Framework for Advanced Wireless Services in the Bands 1755-1780 MHz and 2155-2180 MHz (AWS-3) (SLPB-007-14)*, December 2014 (hereinafter "**2014 AWS-3 Technical, Policy, and Licensing Framework**").

[600] **Exhibit C-231**, Peter Evans, *Rogers buys no new spectrum as AWS-3 wireless auction raises $2.1B*, 6 March 2015, http://www.cbc.ca/news/business/rogers-buys-no-new-spectrum-as-aws-3-wireless-auction-raises-2-1b-1.2983178 (last visited 24 September 2017).

[601] *See* **Exhibit C-233**, Industry Canada, *Transfer of Spectrum Licences Held by Shaw Communications Inc. to Rogers Communications Partnership*, 24 June 2015, http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf11053.html (last visited 24 September 2017); **Exhibit C-234**, Industry Canada, *Transfer of Spectrum Licences Held by Rogers Communications Partnership to WIND Mobile Corp.; Transfer of Spectrum Licences Held by Data and Audio-*

Canada approved Rogers's acquisition of Mobilicity (having blocked three attempts by Telus to purchase Mobilicity). As a requirement for that transaction to proceed, Industry Canada required Rogers to transfer all of Mobilicity's set-aside spectrum to Wind Mobile and its new Canadian owners, in return for a 10 MHz portion of Wind Mobile's set-aside spectrum in Southern Ontario.[602]

262. In other words, after GTH invested C$ 1.3 billion (not including accrued interest) in Wind Mobile and was forced by Canada's measures to sell its investment to a non-Incumbent for nearly no value,[603] Industry Canada:

(a) Approved Rogers's acquisition of Shaw's spectrum for C$ 350 million and Mobilicity for C$ 440 million. This was particularly egregious given that Shaw had sat on its spectrum, in breach of its conditions of license, and the approved values were substantially higher than the price paid for Wind Mobile when Wind Mobile possessed substantially more spectrum than Shaw and Mobilicity.

(b) Ensured that Wind Mobile and its new Canadian owners received substantial amounts of set-aside spectrum for free. As a result the media announced: "*Wind gets windfall.*"[604]

Visual Enterprises Wireless Inc. to Rogers Communications Partnership and to WIND Mobile Corp.; Transfer of a Subdivision of a Licence Held by WIND Mobile Corp. to Rogers Communications Partnership; Subordinate Licence Application for Spectrum Licences Held by WIND Mobile Corp. to Rogers Communications Partnership, 24 June 2015, http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf11054.html (last visited 24 September 2017).

602 *See* **Exhibit C-233**, Industry Canada, *Transfer of Spectrum Licences Held by Shaw Communications Inc. to Rogers Communications Partnership*, 24 June 2015, http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf11053.html (last visited 24 September 2017); **Exhibit C-234**, Industry Canada, *Transfer of Spectrum Licences Held by Rogers Communications Partnership to WIND Mobile Corp.; Transfer of Spectrum Licences Held by Data and Audio-Visual Enterprises Wireless Inc. to Rogers Communications Partnership and to WIND Mobile Corp.; Transfer of a Subdivision of a Licence Held by WIND Mobile Corp. to Rogers Communications Partnership; Subordinate Licence Application for Spectrum Licences Held by WIND Mobile Corp. to Rogers Communications Partnership*, 24 June 2015, http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf11054.html (last visited 24 September 2017).

603 Specifically, C$ 11. *See* **Exhibit C-033**, Purchase Agreement between AAL Acquisitions Corp., GTH Global Telecom Finance (B.C.) Limited, VimpelCom Amsterdam B.V., GTH Global Telecom Holding (Canada) Limited, and Globalive Investment Holdings Corp., 16 September 2014.

604 **Exhibit C-237**, *Rogers buys Mobilicity plus Shaw's 4G spectrum; Wind gets windfall*, TeleGeography, 25 June 2015, https://www.telegeography.com/products/commsupdate/articles/2015/06/25/rogers-buys-mobilicity-plus-

263. The above was an attempt to guarantee that Wind Mobile—which had been created through GTH's substantial investment—would emerge as Canada's desired fourth player. This had been Canada's objective since the introduction of its new transfer framework. As Minister James Moore described in announcing its approval of the Shaw and Mobilicity sales:

> *Today our government approved a series of spectrum licence transfers between Rogers, Shaw, Mobilicity and WIND. These transfers will result in at least four wireless firms in every region of the country being able to offer the latest technology, world-class service and more choice to all Canadians and their families.*[605]

264. While Shaw had decided to exit the market in 2013, thereby "*abandoning plans to become a national wireless carrier*,"[606] it changed course once conditions for New Entrants, and Wind Mobile in particular, changed. Shaw's Chief Operating Officer explained: "[t]*he aspirations were always there in 2011—the economics certainly weren't.*"[607]

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shaws-4g-spectrum-wind-gets-windfall/ (last visited 24 September 2017) ("*Industry Canada confirmed that it has approved the deals, which involve Rogers transferring all of Mobilicity's AWS-1 (1700MHz/2100MHz) frequencies to up-and-coming rival Wind Mobile and splitting Shaw's AWS-1 spectrum between Wind and Rogers, whilst Wind has agreed to give Rogers a portion of its existing AWS-1 frequencies in return. Specifically, Rogers will retain Shaw's 20MHz AWS licences across British Columbia and Alberta, while transferring the remainder of Shaw's regional AWS frequencies – 10MHz in parts of British Columbia, Alberta, Saskatchewan and Northern Ontario – to Wind. All of Mobilicity's AWS spectrum – across Ontario, British Columbia and Alberta – is being transferred to Wind, and in return Rogers is taking a 10MHz portion of Wind's spectrum holdings in Southern Ontario*.").

605 **Exhibit C-235**, Industry Canada, *News Release: Statement by Industry Minister James Moore*, 24 June 2015, https://www.canada.ca/en/news/archive/2015/06/statement-industry-minister-james-moore-991329.html (last visited 24 September 2017). *See also* **Exhibit C-236**, Christine Dobbie, *Rogers-Mobilicity deal shakes up spectrum landscape, rewards Wind*, THE GLOBE & MAIL, 24 June 2015, https://beta.theglobeandmail.com/report-on-business/wind-mobile-will-also-benefit-from-rogers-mobilicity-deal/article25094485/?ref=http://www.theglobeandmail.com& (last visited 24 September 2017); **Exhibit C-238**, Christina Pellegrini, *The inside story of how Rogers Communications Inc acquired Mobilicity: 'Everybody won but Telus,'* FINANCIAL POST, 10 July 2015, http://business.financialpost.com/technology/how-rogers-blindsided-telus-by-acquiring-mobilicity (last visited 24 September 2017).

606 **Exhibit C-239**, *Shaw sees profit surge 44% on sale of spectrum to Rogers*, CBC, 22 October 2015, http://www.cbc.ca/news/business/shaw-earnings-october-2015-1.3283929 (last visited 24 September 2017).

607 **Exhibit C-242**, *Shaw Communications buying Wind Mobile in deal valued at $1.6 billion*, CBC, 16 December 2015, http://www.cbc.ca/news/business/shaw-wind-mobile-1.3368863 (last visited 24 September 2017). **Exhibit C-240**, Howard Solomon, *Shaw may finally get a cellular network if Wind deal is approved*, IT WORLD CANADA, 16 December 2015, https://www.itworldcanada.com/article/shaw-may-finally-get-a-cellular-network-if-wind-

265. On 16 December 2015, after Shaw "*re-examined its wireless strategy*" once conditions had improved,[608] announced its purchase of Wind Mobile for an enterprise value of C$ 1.6 billion.[609]

deal-is-approved/379456 (last visited 24 September 2017) ("*Shaw, a Western cable company, had plans in 2008 to be a cellular carrier, spending $189 million in a spectrum auction that year AWS frequencies largely in British Columbia and Alberta. But three years later, looking at the millions Wind and Quebecor/Videotron were spending to build networks from scratch decided to invest in Wi-Fi hotspots in major Western cities instead as a lure for its cable customers.*"). *See also* **Exhibit C-243**, Christine Dobby, *Shaw's Wind Mobile purchase shakes up Canadian telecom industry*, THE GLOBE & MAIL ("*The cable operator abandoned plans to build its own cellular network from scratch in 2011, but executives said during a conference call that they spent the past 18 months examining various options for an entry into the mobile market and then "pro-actively" approached Wind Mobile.*").

608 **Exhibit C-242**, *Shaw Communications buying Wind Mobile in deal valued at $1.6 billion*, CBC, http://www.cbc.ca/news/business/shaw-wind-mobile-1.3368863 (last visited 24 September 2017).

609 *See* **Exhibit C-241**, Shaw, *Press Release: Shaw Communications Inc. to acquire WIND Mobile Corp.*, 16 December 2015, http://newsroom.shaw.ca/corporate/newsroom/news/2015-12-16-Shaw-Communications-Inc-to-Acquire-WIND-Mobile-Corp/ (last visited 24 September 2017).

VI. THE TRIBUNAL HAS JURISDICTION TO DECIDE THE DISPUTE

A. The Tribunal Has Jurisdiction Over This Dispute In Accordance With The BIT And Article 25 Of The ICSID Convention

266. This Tribunal has jurisdiction over the present dispute as the requirements of the BIT and Article 25 of the ICSID Convention have been met.

267. Article XIII of the BIT provides, in relevant part:

> *1. Any dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement. and that the investor has incurred loss or damage by reason of, or arising out of, that breach, shall, to the extent possible, be settled amicably between them.*
>
> *2. If a dispute has not been settled amicably through consultations within a period of six months from the date on which it was initiated, it may be submitted by the investor to arbitration in accordance with paragraph (4). For the purposes of this paragraph, a dispute is considered to be initiated when the investor of one Contracting Party has delivered notice in writing to the other Contracting Party alleging that a measure taken or not taken by the latter Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach.*
>
> *3. An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if:*
>
> > *(a) the investor has consented in writing thereto;*
> >
> > *(b) the investor has waived its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind;*
> >
> > *(c) if the matter involves taxation, the conditions specified in paragraph 5 of Article XII have been fulfilled; and*

> *(d) not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.*
>
> *4. The dispute may, at the election of the investor concerned, be submitted to arbitration under:*
>
> *(a) The International Centre for the Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington 18 March, 1965 (ICSID Convention), provided that both the disputing Contracting Party and the Contracting Party of the investor are parties to the ICSID Convention; . . .*
>
> *5. Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with the provisions of this Article.*
>
> *6. (a) The consent given under paragraph (5), together with either the consent given under paragraph (3), or the consents given under paragraph (12), shall satisfy the requirements for:*
>
> *(i) written consent of the parties to a dispute for purposes of Chapter II (Jurisdiction of the Centre) of the ICSID Convention . . .*[610]

268. Article 25 of the ICSID Convention provides, in relevant part:

> *(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*

[610] **Exhibit CL-001**, BIT, Art. XIII.

> *(2) "National of another Contracting State" means: . . .*
>
> *(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration . . .*[611]

269. GTH addresses each of the conditions contained in the above provisions in the sections below.

1. The Requirements Of The BIT Have Been Met

a. GTH Is A Protected Investor That Has Made An Investment For The Purposes Of The BIT

270. GTH is a qualifying "*investor*" which has made a protected "*investment*" in Canada for the purposes of the BIT. The BIT covers both natural and juridical persons. Article I(g) of the BIT defines a juridical person "*investor*" of Egypt as follows:

> [T]*he term "juridical person " means any entity established in accordance with, and recognized as a juridical person by the laws of the Arab Republic of Egypt: such as public institutions, corporations, foundations, private companies, firms, establishments and organizations, and having permanent residence in the territory of the Arab Republic of Egypt.*[612]

271. GTH is an Egyptian juridical person. Specifically, it is a joint stock company established in accordance with Egyptian law.[613] In accordance with the definition provided in the BIT,

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611 **ICSID Convention**, Art. 25.

612 **Exhibit CL-001**, BIT, Art. I(g). The French and Arabic versions of the BIT, which are equally authentic, support the same conclusion.

613 **Request for Arbitration**, Annex E.

GTH's status as an Egyptian joint stock company is sufficient for it to qualify as an investor pursuant to the BIT. [614]

272. Article I(f) of the BIT defines a protected "*investment*" as, in relevant part:

> *[A]ny kind of asset owned or controlled either directly, or indirectly through an investor of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws and in, particular, though not exclusively, includes: . . .*
>
> > *(ii) shares, stock, bonds and debentures or any other form of participation in a company, business enterprise or joint venture . . .*
> >
> > *(iii) money, claims to money, and claims to performance under contract having financial value . . .*
> >
> > *(vi) rights, conferred by law or under contract, to undertake any economic and commercial activity, including any rights to search for, cultivate, extract or exploit natural resources.* [615]

273. As set forth in Part IV, GTH made substantial investments in Canada as an indirect shareholder of Wind Mobile.[616] For the duration of its investment in Canada, GTH indirectly held approximately 65% of the equity in Globalive Investment, which in turn owned 100% of Wind Mobile. GTH also invested in several loans to Wind Mobile, which

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614 Canada is incorrect to the extent that it contends that having a "*permanent residence*" in Egypt is separate and independent from the requirement that a juridical person must be "*established in accordance with, and recognized as a juridical person by the laws of the Arab Republic of Egypt.*" [redacted] *See* **Claimant's Submission on Bifurcation, Publication, and Place of Proceeding**, ¶ 13.

615 **Exhibit CL-001**, BIT, Art. I(f).

616 It is well-settled that indirect shareholders and debt-holders can bring claims for indirect loss or damage suffered as a result of a breach of the BIT. *See, e.g.*, **Exhibit CL-005**, *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, 42 I.L.M. 788 (2003), ¶¶ 57-65; **Exhibit CL-006**, *ConocoPhillips Petrozuata B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, 3 September 2013, ¶¶ 282-86; **Exhibit CL-014**, *Mobil Corporation, Venezuela Holdings, B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, ¶¶ 162-66.

were used to purchase spectrum and to maintain operations, among other activities. Altogether, including both equity and debt, GTH invested approximately C$ 1.3 billion, not including interest, in Wind Mobile. These investments were accompanied by the various contractual and legal rights described in Parts IV.B abd IV.C. GTH's bundle of rights qualify as a protected investment under Articles I(f)(ii), (iii) and (vi) of the BIT.[617]

b. There Is A Qualifying Dispute For the Purposes Of The BIT

274. Regarding the nature of the dispute, the BIT requires only that the dispute be "*between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach*."[618]

275. The present dispute relates to Canada's treatment of GTH's investments in Canada, which, as GTH will demonstrate in Parts VII and VIII, amount to breaches of Canada's obligations

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[617] **Exhibit CL-058**, *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, ¶ 96 ("*the Tribunal wishes to emphasize that an investment is not a single right but is, like property, correctly conceived of as a bundle of rights, some of which are inseparable from others and some of which are comparatively free-standing*"); **Exhibit CL-040**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, ¶¶ 303-304 (the Tribunal agreeing with Professor James Crawford's explanation that what had been expropriated there was a "*bundle of rights and legitimate expectations*"); **Exhibit CL-063**, Andrés Rigo Sureda, INVESTMENT TREATY ARBITRATION: JUDGING UNDER UNCERTAINTY (2012), pp. 57-58 ("*By and large tribunals carry out a comprehensive analysis of all the elements of the investment operation and consider 'the general unity of an investment operation', in the words of the Tribunal in the first ICSID case, Holiday Inns v. Morrocco. . . .* [I]*nvestments would often not occur if guarantees and other contingent obligations were not part of the bundle of rights which constitute the investment.*").

[618] **Exhibit CL-001**, BIT, Art. XIII(1).

pursuant to the BIT and caused GTH substantial damage. Therefore, there is a qualifying dispute for the purpose of the BIT.

c. The Parties Have Provided Their Written Consent To ICSID's Jurisdiction For the Purposes Of The BIT

276. In accordance with Article XIII(6)(a)(i) of the BIT, the Parties have provided their written consent to ICSID's jurisdiction over this dispute.[619] Canada has provided its written consent in the BIT,[620] and GTH has provided its written consent its trigger letter dated 27 November 2015.[621] GTH reaffirmed its consent to arbitration in its Request for Arbitration dated 28 May 2016.[622]

d. All Remaining Requirements Of The BIT Have Been Met

277. The six-month amicable negotiation period, which was initiated by GTH with written notice on 27 November 2015, had expired by the time GTH filed its Request for Arbitration on 28 May 2016.[623] In addition, in its Request for Arbitration, GTH waived its right to initiate proceedings in relation to the measures that it has alleged to be in breach of the BIT

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619 **Exhibit CL-001**, BIT, Art. XIII(6)(a)(i) (explaining that Canada's unconditional consent to submit disputes to international arbitration (Article XIII(5)) along with the satisfaction of conditions set out in Article XIII(3)(a) "*shall satisfy the requirements for . . . written consent of the parties to a dispute for purposes of Chapter II (Jurisdiction of the Centre) of the ICSID Convention. . .*").

620 **Exhibit CL-001**, BIT, Art. XIII(5) ("*Each Contracting Party hereby gives its unconditional consent to submission of a dispute to international arbitration in accordance with the provisions of this Article*.").

621 **Request for Arbitration**, Annex F ("*In the event that these negotiation efforts do not yield a solution within six months of the date of today's letter, the Investor reserves all of its rights, including the right to submit this dispute without further notice to an international arbitral tribunal, seeking appropriate relief and substantial damages*.").

622 **Request for Arbitration**, ¶ 74.

623 *See* **Exhibit CL-001**, BIT, Art. XIII(1)-(2).

before the courts or tribunals of Canada or in another dispute settlement procedure of any kind.[624]

278. For the avoidance of doubt, GTH observes that its claims that Canada had breached the BIT were brought by GTH, at the latest, on 27 November 2015 in its written notice.

2. The Requirements Of Article 25 Of The ICSID Convention Have Been Met

279. The requirements of Article 25 of the ICSID Convention have also been met. At the time of the Request for Arbitration:

(a) Egypt and Canada were Contracting States of the ICSID Convention;[625]

(b) GTH was an Egyptian company thereby qualifying as "*a national of another Contracting State*";[626] and

(c) Both Canada and GTH had provided their written consent to arbitrate this dispute.[627]

280. In addition, the present dispute is a "*legal dispute arising directly out of an investment*."[628] While Article 25 of the ICSID Convention does not define the terms "*legal dispute*" and "*investment*," it is uncontroversial that this dispute is "*legal*" in nature as it relates to claims arising under Canada's obligations pursuant to the BIT.[629] Satisfaction of the definition of

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624 **Request for Arbitration**, ¶ 69; **Exhibit CL-001**, BIT, Art. XIII(3)(b).

625 **Request for Arbitration**, Annex F.

626 *See supra* Part VI.A.1.a.

627 *See supra* Part VI.A.1.c.

628 **ICSID Convention**, Art. 25(1).

629 *See, e.g.*, **Exhibit CL-021**, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965 ("**Report of the Executive Directors on the Convention**"), ¶ 26 ("*Article 25(1) requires that the dispute must be a 'legal dispute arising directly out of*

investment contained in the BIT is sufficient to qualify as an investment pursuant to the ICSID Convention.[630]

3. The Tribunal Has Jurisdiction To Decide The Dispute

281. As all of the jurisdictional requirements contained in Article XIII of the BIT and Article 25 of the ICSID Convention have been satisfied, the Tribunal has jurisdiction over the present dispute.

B. The Applicable Law Of This Dispute Is The BIT And Applicable Rules of International Law

282. Article 42(1) of the ICSID Convention provides that "[t]*he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. . . .*"[631] The rules of law applicable to this particular dispute have been agreed in Article XIII(7) of the BIT, which provides that "[a] *tribunal established under this Article shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law*."[632]

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an investment.' The expression 'legal dispute' has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.").

630 *See, e.g.*, **Exhibit CL-021**, Report of the Executive Directors on the Convention, ¶ 27 ("*No attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4))*."); **Exhibit CL-055**, *Malaysian Historical Salvors Sdn Bhd v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, ¶¶ 73-74 ("*It is . . . bilateral and multilateral treaties which today are the engine of ICSID's effective jurisdiction. To ignore or depreciate the importance of the jurisdiction they bestow upon ICSID, and rather to embroider upon questionable interpretations of the term 'investment' as found in Article 25(1) of the Convention, risks crippling the institution*.").

631 **ICSID Convention**, Art. 42(1).

632 **Exhibit CL-001**, BIT, Art. XIII(7).

On this basis, the law applicable to this dispute is reflected in the provisions of the BIT and international law.

VII. CANADA HAS BREACHED FUNDAMENTAL OBLIGATIONS UNDER THE BIT

283. The preeminent authority, the late Professor Ian Brownlie, described that a foreign investor "*cannot be expected to accept a distorted and unforeseeable manipulation of the legal procedures of the host State*.'"[633] In this case, while GTH assumed certain business risks, it could not foresee that Canada would not abide by its commitments. Nor could GTH foresee that Canada would use its asymmetric sovereign power to manipulate the rules in such an arbitrary and unpredictable fashion in order to achieve its own capricious end.

284. Canada's acts throughout the course of GTH's investment, while they amount to separate and independent breaches of the BIT, must also be viewed as a pattern of conduct that, as a whole, substantially deprived GTH of its "*bundle of rights and legitimate expectations*."[634] As described in Part III.B, Canada created its 2008 AWS Auction framework to convince investors to enter the Canadian wireless telecommunications market. It offered a series of policies and conditions it knew were necessary to induce this investment, and thereby intended for new investors, like GTH, to rely on these policies and conditions to spend millions of dollars (or in GTH's case over one billion dollars) in Canada. GTH accordingly relied on Canada's commitments. From the start, GTH contributed approximately C$ 442 million to purchase set-aside spectrum licenses from

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633 **Exhibit CL-022**, Ian Brownlie, *Treatment of Aliens: Assumption of Risk and the International Standard in* INTERNATIONAL LAW AND ECONOMIC LEGAL ORDER: ESSAYS IN HONOR OF F.A. MANN ON THE OCCASION OF HIS 70TH BIRTHDAY (1977), 319.

634 **Exhibit CL-040**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, ¶¶ 303-304 (the Tribunal agreeing with Professor James Crawford's explanation that what had been expropriated in that case was a "*bundle of rights and legitimate expectations*").

Canada, and, in total, C$ 1.3 billion during the lifetime of its investment in an effort to establish a viable operator.

285. Canada, however, not only ignored the key conditions it had put in place to encourage new investment in Canada, but in fact introduced new obstacles which impeded Wind Mobile's ability to compete. Canada's actions, which were divorced from its stated objective to facilitate new entry and foster a competitive market, slowly and surely crippled GTH's ability to sustain a viable business.

286. As a direct consequence of Canada's failures, GTH was forced to contemplate various strategic options for the future of the business, including selling its investment to an Incumbent in accordance with the terms set out in Canada's policy documents, the provisions of the Wind Mobile's licenses, and general practice. This option to sell and exit the market to an Incumbent became even more valuable to GTH when Canada, through a nontransparent and discriminatory review procedure, refused to allow GTH to take voting control over its substantial investment. However, Canada delivered a final blow. Rather than allow GTH to exit by selling to an Incumbent in accordance with the conditions put in place in 2008, Canada introduced a brand new framework specifically designed to prevent GTH and other New Entrants from selling their investments to an Incumbent.

287. Canada's acts left GTH no choice but to sell its investment at a fraction of its value. Canada, on the other hand, received exactly what it sought—a so-called fourth player in the wireless telecommunications market—while GTH was forced to bear the cost.

288. The Canada-Egypt BIT, the purpose of which is to "*increase the confidence of investors, provide greater investment protection and help promote bilateral investment flows*,"[635] contains key provisions common to other bilateral investment treaties to protect GTH from the exact type of conduct Canada had engaged in. These protections include obligations by Canada to accord GTH's investments fair and equitable treatment ("**FET**"), full protection and security ("**FPS**"), guarantee the unrestricted transfer of investments, and guarantee national treatment.

289. Over the course of GTH's investment, Canada breached each of these obligations. First, Canada breached the FET standard by: (*i*) blocking GTH's attempts to sell Wind Mobile to an Incumbent; (*ii*) subjecting GTH to an unreasonable, arbitrary, and nontransparent national security review of GTHCL's Voting Control Application, without due process; and (*iii*) its treatment of GTH over the lifetime of its investment in Wind Mobile. These actions, cumulatively (and in some cases individually) amount to a breach of FET. Second, Canada's conduct amounts to an breach of Canada's obligations to accord FPS. Third, Canada's denial of GTH's right to transfer its investment in Wind Mobile to an Incumbent amounts to a breach of the free transfer provision of the BIT. Finally, Canada breached its obligation to accord national treatment to GTH when it subjected GTH to the

[635] **Exhibit C-037**, External Affairs and International Trade Canada, *Canadian Ambassador Signs Foreign Investment Protection Agreement with Egyptian Minister of International Cooperation*, 13 November 1996 [ATI Document]. The Preamble of the BIT explains that the parties "*recogniz*[e] *that the promotion and protection of investments of investors of one Contracting Party in the territory of the other Contracting Party will be conducive to the stimulation of business initiative and to the development of economic cooperation between them*." **Exhibit CL-001**, BIT, Preamble. The purpose of a BIT is to "*protect and promote foreign investment through legally-binding rights and obligations*." It is for this reason that Canada calls its bilateral investment treaties "*Foreign investment promotion and protection agreements*." *See* **Exhibit C-251**, Industry Canada, *Agreement types*, http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/agreements_type-type_accords.aspx?lang=eng (last visited 24 September 2017).

discriminatory review of the Voting Control Application. Below, GTH addresses each of these breaches in turn.

A. Canada Has Failed To Afford GTH's Investment Fair And Equitable Treatment

1. The Fair And Equitable Treatment Standard

290. Article II(2)(a) of the BIT requires Canada to "*accord investments or returns of investors of the other Contracting Party . . . fair and equitable treatment in accordance with principles of international law . . .*"[636] This article protects an investor from acts by a Host State which are unjust and contrary to the purpose of the Treaty. The standard "*serves the purpose of justice*" by allowing tribunals to fill in any potential gaps not explicitly covered by other treaty protections in order to safeguard the object and purpose of the BIT.[637] Thus, the FET standard is necessarily a flexible one, and the decision of what is "fair and

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[636] **Exhibit CL-001**, BIT, Art. II(2)(a).

[637] **Exhibit CL-072**, Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 S.C. J. OF INT'L L. 7 (2013), 12 ("*Similar to clauses in classical civil codes in Continental Europe, the FET standard serves to address such acts and occurrences which do not fall into the net of specific standards but nevertheless are deemed to be inconsistent with the object and purpose of the BIT, i.e., to protect and promote foreign investment and thereby to contribute to the economic goals of the host state, as often recognized in BIT preambles. The acceptance of the standard is directly linked to the fundamental moral and legal grounding of the notion of fairness, anchored in a universally accepted sense of justice, but also in classic rules of customary law governing the protection of foreign nationals and companies*."); **Exhibit CL-087**, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, ¶ 380 (citing UNCTAD for the proposition that FET "*'helps to ensure that there is at least a minimum level of protection, derived from fairness and equity, for the investor concerned*.'"); **Exhibit CL-042**, *PSEG Global Inc. and Konya Ilgın Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, ¶ 239 ("*Yet,* [FET] *clearly does allow for justice to be done in the absence of the more traditional breaches of international law standards. This role has resulted in the concept of fair and equitable treatment acquiring a standing on its own, separate and distinct from that of other standards, albeit many times closely related to them, and thus ensuring that the protection granted to the investment is fully safeguarded*."); **Exhibit CL-083**, *Murphy Exploration & Production Company – International v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶ 206 ("*the function of the FET clause in investment treaties is broadly the same: it ensures the stability and predictability of the legal and business framework in the State party subject to any qualifications otherwise established by the treaty and under international law*").

equitable" must be considered against the facts of each case,[638] while keeping in mind, as the tribunal in *PSEG Global Inc. v. Republic of Turkey* recognized, that the standard "*allow*[s] *for justice to be done in the absence of the more traditional breaches of international law standards . . . thus ensuring that the protection granted to the investment is fully safeguarded*."[639]

291. The ordinary meaning of the terms "*fair*" and "*equitable*" establish that Canada must treat GTH's investment with "*just*," "*even-handed*," "*unbiased*," "*legitimate*," and "*reasonable*" behavior.[640] However, these words must be interpreted in the context of the specific treaty

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638 *See* **Exhibit CL-070**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶¶ 505-506 ("*It is undisputed that an analysis of whether a state's conduct has been fair and equitable requires an assessment of all the facts, context and circumstances of a particular case*."); **Exhibit CL-075**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 566 ("*The Tribunal shares the view expressed by other investment treaty tribunals that in order to establish whether an investment has been accorded fair and equitable treatment, all of the facts and circumstances of the particular case must be considered*."); **Exhibit CL-038**, *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶¶ 285, 291, 309 ("*To the extent that the case law reveals different formulations of the relevant thresholds, an in-depth analysis may well demonstrate that they could be explained by the contextual and factual differences of the cases to which the standards have been applied*."); **Exhibit CL-086**, *Windstream Energy LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2013-22, Award, 27 September 2016, ¶¶ 361-62 ("*In other words, just as the proof of the pudding is in the eating (and not in its description), the ultimate test of correctness of an interpretation is not in its description in other words, but in its application on the facts*."); **Exhibit CL-082**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 544 ("*The Tribunal further wishes to point out that the analysis of whether a state's conduct has been fair and equitable requires an assessment of all the facts, context and circumstances of a particular case*."); **Exhibit CL-060**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, ¶ 188 ("*A fourth important characteristic of the term is that its application is crucially dependent on an evaluation of the facts of each case*.").

639 **Exhibit CL-042**, *PSEG Global Inc. and Konya Ilgın Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, ¶ 239.

640 *See, e.g.*, **Exhibit CL-071**, Black's Law Dictionary, Definitions of "*Fair*" and "*Equitable*"; **Exhibit CL-033**, *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award 25 May 2004, ¶ 113; **Exhibit CL-053**, *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, ¶ 168; **Exhibit CL-038**, *Saluka Investments BV v The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 297; **Exhibit CL-082**, *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 538; **Exhibit CL-070**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 504; **Exhibit CL-085**, *Flemingo DutyFree Shop Private Limited v. The Republic of Poland*, UNCITRAL, Award, 12 August 2016, ¶¶ 530, 535; **Exhibit CL-060**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, ¶¶ 212-13. The Vienna Convention on the Law

in which they are found. Turning to the context of Article II(2) and the BIT's object and purpose, the preamble of the BIT provides that the Contracting Parties:

> *RECOGNIZ[ed] that* ***the promotion and the protection of investments*** *of investors of one Contracting Party in the territory of the other Contracting Party will be conducive to* ***the stimulation of business initiative*** *and to* ***the development of economic cooperation between them***.[641]

292. In addition, Article II(2) is a sub-section of a provision entitled "*Establishment, Acquisition and Protection of Investments*."[642] Immediately preceding Article II(2), Article II(1) of the BIT provides that "[e]*ach Contracting Party shall encourage the creation of favourable conditions for investors of the other Contracting Party to make investments in its territory*."[643]

293. Thus, the FET provision in this BIT must be interpreted in the context of a treaty designed to promote, protect, and stimulate foreign investment as between the Contracting Parties,[644]

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of Treaties directs the tribunal to interpret the BIT "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*." **Exhibit CL-018**, Vienna Convention on the Law of Treaties, Art. 31(1). *See, e.g.,* **Exhibit CL-039**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 359; **Exhibit CL-060**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, ¶ 211.

641 **Exhibit CL-001**, BIT, Preamble (emphases added).

642 **Exhibit CL-001**, BIT, Art. II.

643 **Exhibit CL-001**, BIT, Art. II(1).

644 *See, e.g.*, **Exhibit CL-038**, *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 298 (observing that the preamble of the treaty "*links the 'fair and equitable treatment' standard directly to the stimulation of foreign investments and to the economic development of both Contracting Parties*"); **Exhibit CL-033**, *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 113 (considering the preamble of the relevant treaty and finding that "*in terms of the BIT, fair and equitable treatment should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment. Its terms are framed as a pro-active statement –'to promote', 'to create', 'to stimulate'- rather than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investors*"); **Exhibit CL-031**, *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 156 (observing that the preambular paragraphs of the treaty demonstrated the parties' intention to strengthen and increase the security and trust of foreign investors that invest in the host states); **Exhibit CL-045**, *Compañía de Aguas del Aconquija S.A. and Vivendi*

and within a specific provision addressing the establishment, acquisition, and protection of investments by creating "*favourable conditions for investors*."[645]

294. Keeping in mind the plain language of the provision and the context of the provision within this BIT, the FET standard protects an investor from several other forms of State conduct considered to be unfair or inequitable. The tribunal in *Técnicas Medioambientales TECMED S.A. v. The United Mexican States* summarized the obligation as follows:

> *The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. . . . The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business*

Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶ 7.4.4 ("*As to the object and purpose of the BIT, the Tribunal notes the parties' wish, as stated in the preamble, for the Treaty to create favourable conditions for French investments in Argentina, and vice versa, and their conviction that the protection and promotion of such investments is expected to encourage technology and capital transfers between both countries and to promote their economic development. In interpreting the BIT, we are thus mindful of these objectives*."); **Exhibit CL-053**, *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, ¶ 170 (reading the relevant treaty's FET provision in the context of the preamble and rejecting Respondent's attempt to limit FET protection to the minimum standard of treatment). *See also* **Exhibit CL-036**, *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 274 (referring to the preamble of the relevant treaty and finding that "[t]*here can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment*"); **Exhibit CL-041**, *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶¶ 124-26; **Exhibit CL-039**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 360.

645 *See, e.g.*, **Exhibit CL-053**, *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, ¶ 170 (reading the relevant treaty's FET provision contained in Article 2(2) in the context of the treaty's Article (2)(1), finding that "*the obligation of fair and equitable treatment is placed squarely in the context of an obligation to 'encourage and create' favorable conditions for investors*," and observing in this context that the Contracting Parties did not mean to limit FET protection to the minimum standard of treatment).

> *activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.*[646]

295. While the separate elements of FET have been articulated in different ways, tribunals have consistently held that the FET standard protects an investor against State conduct that is:

(a) unreasonable,[647] arbitrary,[648] discriminatory,[649] or inconsistent;[650]

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[646] **Exhibit CL-031**, *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 154. *See also* **Exhibit CL-033**, *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award 25 May 2004, ¶¶ 114-15 (applying the FET standard as set out in *Tecmed*).

[647] **Exhibit CL-070**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 525 (citing the parties agreement that unreasonable "*means lacking in justification or not grounded in reason (i.e., arbitrary), or not enacted in pursuit of legitimate objectives*" and relying on the tribunal's analysis in *AES v. Hungary* for the proposition that "*for a state's conduct to be reasonable, it is not sufficient that it be related to a rational policy; it is also necessary that, in the implementation of that policy, the state's acts have been appropriately tailored to the pursuit of that rational policy with due regard for the consequences imposed on investors*"); **Exhibit CL-038**, *Saluka Investments BV v The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 307 (observing that state conduct should be "*reasonably justifiable by public policies*").

[648] **Exhibit CL-082**, *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 543, 577-78 ("*In the Tribunal's eyes, a measure is for instance arbitrary if it is not based on legal standards but on excess of discretion, prejudice or personal preference, and taken for reasons that are different from those put forward by the decision maker*."); **Exhibit CL-031**, *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 154; **Exhibit CL-038**, *Saluka Investments BV v The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 307 ("*A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies bona fide by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and nondiscrimination. In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment*."); **Exhibit CL-057**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶¶ 284, 418.

[649] **Exhibit CL-082**, *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 543; **Exhibit CL-033**, *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 109 (noting the parties' agreement that FET encompassed nondiscrimination among other fundamental standards); **Exhibit CL-038**, *Saluka Investments BV v The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 307; **Exhibit CL-057**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 284.

[650] **Exhibit CL-082**, *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 543, 579 ("*Linked to the notion of transparency is the concept of consistency, which requires that '[o]ne arm of the State cannot […] affirm what another arm denies to the*

(b) lacking in transparency;[651] or

(c) lacking in procedural propriety and due process.[652]

296. Moreover, the FET standard prohibits a State from frustrating an investor's legitimate expectations relied upon by the investor at the time the investment was made.[653] An

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detriment of a foreign investor""); **Exhibit CL-031**, *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 154; **Exhibit CL-038**, *Saluka Investments BV v The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶¶ 307, 309; **Exhibit CL-033**, *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 163 (finding a breach of FET where there was an "*inconsistency of action between two arms of the same Government vis-à-vis the same investor even when the legal framework of the country provides for a mechanism to coordinate*"); **Exhibit CL-087**, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, ¶ 382 (observing that the inconsistent behavior between two arms of the Turkish government "*would alone have been sufficient to call into question whether the Claimant had been treated fairly and equitably*"); **Exhibit CL-057**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 284.

[651] **Exhibit CL-082**, *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 543, 579 ("*Furthermore, as noted by a number of arbitral tribunals, FET 'requires that any regulation of an investment be done in a transparent manner . . .'*"); **Exhibit CL-031**, *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶¶ 154, 167, 172 (at ¶ 167 observing that "*the Claimant was entitled to expect that the government's actions would be free from any ambiguity that might affect the early assessment made by the foreign investor of its real legal situation or the situation affecting its investment and the actions the investor should take to act accordingly*"); **Exhibit CL-075**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 570 ("*Fair and equitable treatment also requires that any regulation of an investment be done in a transparent manner. . .*"); **Exhibit CL-038**, *Saluka Investments BV v The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶¶ 307, 309; **Exhibit CL-057**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 284 ("*an absence of transparency in the legal procedure or in the actions of the State*" is a factor relevant to the FET standard); **Exhibit CL-041**, *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 128 ("*This means that violations of the fair and equitable treatment standard may arise from a State's failure to act with transparency –that is, all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made under an investment treaty should be capable of being readily known to all affected investors*.").

[652] **Exhibit CL-038**, *Saluka Investments BV v The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 308 ("*Finally, it transpires from arbitral practice that, according to the 'fair and equitable treatment' standard, the host State must never disregard the principles of procedural propriety and due process and must grant the investor freedom from coercion or harassment by its own regulatory authorities*." (citations omitted)); **Exhibit CL-057**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 284 ("*whether due process has been denied to the investor*" is a factor relevant to the FET standard).

[653] **Exhibit CL-083**, *Murphy Exploration & Production Company – International v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶¶ 247-48; **Exhibit CL-031**, *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶¶ 154-56 (observing that the FET provision of the treaty "*in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment which*

investor's legitimate expectations can arise from representations or assurances, either explicit or implicit, made by the host State at the time of the investment,[654] and from the legal and business framework existing at the time of its investment, particularly when that framework is designed to induce investment.[655] As explained by Professor Michael

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does not affect the basic expectations that were taken into account by the foreign investor to make the investment"); **Exhibit CL-038**, *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶¶ 301-302 ("[a]*n investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable. The standard of 'fair and equitable treatment' is therefore closely tied to the notion of legitimate expectations which is the dominant element of that standard*" (citations omitted)); **Exhibit CL-075**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 570; **Exhibit CL-082**, *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 543, 546-47; **Exhibit CL-050**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶¶ 339-40; **Exhibit CL-041**, *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶¶ 127-28; **Exhibit CL-053**, *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, ¶¶ 173-75; **Exhibit CL-057**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 264; **Exhibit CL-070**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 667 ("*an overwhelming majority of cases supports the contention that, where the investor has acquired rights, or where the state has acted in such a way so as to generate a legitimate expectation in the investor and that investor has relied on that expectation to make its investment, action by the state that reverses or destroys those legitimate expectations will be in breach of the fair and equitable treatment standard and thus give rise to compensation*"); **Exhibit CL-060**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, ¶¶ 222-26; **Exhibit CL-039**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 372 (noting that another element of FET "*is the frustration of expectations that the investor may have legitimately taken into account when it made the investment*"); **Exhibit CL-085**, *Flemingo DutyFree Shop Private Limited v. The Republic of Poland*, UNCITRAL, Award, 12 August 2016, ¶ 534.

654 **Exhibit CL-070**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 669 ("*There must be a promise, assurance or representation attributable to a competent organ or representative of the state, which may be explicit or implicit*."); **Exhibit CL-075**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 571 ("*The investor's legitimate expectations are based on undertakings and representations made explicitly or implicitly by the host State*."); **Exhibit CL-039**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 318 (considering *Tecmed*, and finding that "[t]*he expectations as shown in that case are not necessarily based on a contract but on assurances explicit or implicit, or on representations, made by the State which the investor took into account in making the investment*").

655 **Exhibit CL-062**, Rudolf Dolzer & Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2d ed 2012), p. 145 ("*The investor's legitimate expectations are based on the host state's legal framework and on any undertakings and representations made explicitly or implicitly by the host state. The legal framework on which the investor is entitled to rely consists of legislation and treaties, assurances contained in decrees, licences, and similar executive statements, as well as contractual undertakings*." (citations omitted)); **Exhibit CL-038**, *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 301 ("*An investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor's expectation that the conduct of the host*

Reisman and Mahnoush Arsanjani, "[w]*here a host State which seeks foreign investment acts intentionally, so as to create expectations in potential investors with respect to particular treatment or comportment, the host state should . . . be bound by the commitments and the investor is entitled to rely upon them in instances of decision.*"[656]

297. When considering whether a State's representations or legal framework can give rise to an investor's legitimate expectations, "[i]*t is irrelevant whether the state in fact wished to commit itself; it is sufficient that it acted in a manner that would reasonably be understood to create such an appearance.*"[657]

State subsequent to the investment will be fair and equitable."); **Exhibit CL-060**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, ¶ 226 ("*In examining the various cases that have justifiably considered the legitimate expectations of investors and the extent to which the host government has frustrated them, this Tribunal finds that an important element of such cases has not been sufficiently emphasized: that investors, deriving their expectations from the laws and regulations adopted by the host country, acted in reliance upon those laws and regulations and changed their economic position as a result. Thus it was not the investor's legitimate expectations alone that led tribunals to find a denial of fair and equitable treatment. It was the existence of such expectations created by host country laws, coupled with the act of investing their capital in reliance on them, and a subsequent, sudden change in those laws that led to a determination that the host country had not treated the investors fair and equitably*."); **Exhibit CL-041**, *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 133 (finding that Argentina had "*created specific expectations among investors*" through guarantees provided in its legislation and regulations, and was therefore bound by these guarantees); **Exhibit CL-053**, *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, ¶ 179 (finding breach of FET where Argentina "*fundamentally changed the legal framework on the basis of which the Respondent itself had solicited investments and the Claimant had made them*"); **Exhibit CL-047**, *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, ¶¶ 298, 307, 310 (observing that "[t]*he duties of the host State must be examined in the light of the legal and business framework as represented to the investor at the time that it decides to invest*"). *See also* **Exhibit CL-034**, *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004, ¶ 191 (observing that "*there is certainly an obligation not to alter the legal and business environment in which the investment has been made*"); **Exhibit CL-037**, *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, ¶¶ 231-32 (finding breach of FET where the organs of the Government "*breached the basic expectations of Eureko that are at the basis of its investment*" and were enshrined in the underlying contractual agreements); **Exhibit CL-070**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 674 (finding Romania had made a promise or assurance, through its legal framework and issued certificates, which gave rise to the investors' legitimate expectation).

656 **Exhibit CL-032**, W. Michael Reisman & Mahnoush H. Arsanjani, *The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes*, 19 ICSID REVIEW – FILJ 328 (2004), p. 342.

657 **Exhibit CL-070**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 669.

298. The tribunal in *Murphy Exploration & Production Company – International v. Ecuador* explains:

> *An investor's legitimate expectations are based upon an objective understanding of the legal framework within which the investor has made its investment. The legal framework on which the investor is entitled to rely consists of the host State's international law obligations, its domestic legislation and regulations, as well as the contractual arrangements concluded between the investor and the State. Specific representations or undertakings made by the State to an investor also play an important role in creating legitimate expectations on the part of the investor but they are not necessary for legitimate expectations to exist. An investor may hold legitimate expectations based on an objective assessment of the legal framework absent specific representations or promises made by the State to the investor.*[658]

299. The tribunal's analysis in *Murphy* concurs with that of numerous other tribunals, who have found that a State's obligation to protect an investor's legitimate expectations is linked to the oft-cited obligation of a State to provide a stable and predictable legal and business environment.[659] This is not to say that a State does not maintain its regulatory power to

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[658] **Exhibit CL-083**, *Murphy Exploration & Production Company – International v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶ 248 (citations omitted).

[659] **Exhibit CL-031**, *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 154 ("*The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations*."); **Exhibit CL-050**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, ¶ 340 ("*The stability of the legal and business environment is directly linked to the investor's justified expectations*."); **Exhibit CL-041**, *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶¶ 124-25. *See also* **Exhibit CL-036**, *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶¶ 274-76, 284 ("[t]*here can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment*" and "*the Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law*"); **Exhibit CL-074**, *OAO Tatneft v. Ukraine*, UNCITRAL, Award on the Merits, 29 July 2014, ¶ 407 ("[a] *predictable, consistent and stable legal framework is a FET requirement which ought to be safeguarded in its integrity irrespective of which organ of the State might compromise its availability*

adapt its laws and regulations in response to public needs. Rather, a State must compensate an affected foreign investor when it exercises its regulatory power in a way that: (*i*) changes the legal and business framework "*in an important manner*";[660] *or* (*ii*) is substantively or procedurally improper (such that the conduct fails to satisfy other requirements of the FET standard because it is unreasonable, arbitrary, or lacking in due process).[661] In other words, an investor cannot reasonably be expected to bear the cost associated with a State's decision to change its regulatory environment in an "*important*" or "*fundamental*" way, nor can it expect to suffer a State's regulatory conduct which is arbitrary, unreasonable, disproportionate, or otherwise improper.[662]

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as is well recognized under international law in the context of attribution of wrongful acts"); **Exhibit CL-034**, *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004, ¶¶ 183, 191 (finding that "[t]*he stability of the legal and business framework is thus an essential element of fair and equitable treatment*" and noting that the question at issue with respect to the alleged breach of FET was "*whether the legal and business framework meets the requirements of stability and predictability under international law*"; further concluding that "*there is certainly an obligation not to alter the legal and business environment in which the investment has been made*"); **Exhibit CL-057**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 284 (identify one of the factors of determining a breach of FET as "*whether the State has failed to offer a stable and predictable legal framework*"); **Exhibit CL-047**, *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, ¶ 307 (finding that Argentina's alteration of the legal and business environment "*violated the principles of stability and predictability inherent to the standard of fair and equitable treatment*").

660 **Exhibit CL-034**, *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004, ¶¶ 183-84 (finding that "[t]*he stability of the legal and business framework is . . . an essential element of fair and equitable treatment*" and finding a violation of the FET obligation where "*the framework under which the investment was made and operates has been changed in an important manner*"); **Exhibit CL-089**, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à r.I. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, ¶ 363 ("*fair and equitable treatment does protect investors from a fundamental change to the regulatory regime in a manner that does not take account of the circumstances of existing investments made in reliance on the prior regime*").

661 **Exhibit CL-070**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 529 ("*In the Tribunal's view, the correct position is that the state may always change its legislation, being aware and thus taking into consideration that: (i) an investor's legitimate expectations must be protected; (ii) the state's conduct must be substantively proper (e.g., not arbitrary or discriminatory);and (iii) the state's conduct must be procedurally proper (e.g., in compliance with due process and fair administration). If a change in legislation fails to meet these requirements, while the legislation may be validly amended as a matter of domestic law, the state may incur international liability.*").

662 **Exhibit CL-089**, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à r.I. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, ¶ 363.

300. Moreover, Canada's acts need not be "*egregious*" or in bad faith to amount to a breach.[663] While such conduct would be sufficient to establish such a breach, neither is it necessary for Canada to have failed to live up to its obligations as set forth in the BIT.

301. Applying the principles set forth above, Canada has breached its obligation under Article II(2)(a) of the BIT to accord FET to GTH's investment. Having induced GTH's investment in Canada on the basis of a series of conditions promised at the outset of its investment, Canada's breaches of its FET obligation arise from the following acts (taken together and, in certain cases, separately):

(a) Blocking GTH's right to transfer Wind Mobile's set-aside spectrum licenses to an Incumbent at the expiration of the Five-Year Rollout Period;

(b) Subjecting GTH to an unreasonable, arbitrary, non-transparent national security review of the Voting Control Application, without due process;

(c) Subjecting GTH's investment to a redundant CRTC Review and failing to uphold basic conditions to alleviate barriers to market entry (particularly with respect to roaming and tower sharing), which when considered cumulatively with Canada's acts identified in (*a*) and (*b*), in total amount to a separate and cumulative breach of FET.

302. Below, GTH addresses the independent breaches resulting from (a) and (b) above before discussing the cumulative breach resulting from all of these measures taken together.

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663 *See, e.g.*, **Exhibit CL-082**, *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 543.

2. Canada Breached The Fair And Equitable Treatment Standard When It Blocked GTH From Transferring Wind Mobile's Licenses To An Incumbent After The Five-Year Rollout Period

303. As set forth in Part III.B, Canada put in place a specific policy and regulatory framework with the aim of attracting committed and genuine new investment in the wireless telecommunications market. With this objective, one of Canada's measures was to implement the Five-Year Rollout Period. For the first five years, New Entrants would not be allowed to sell their set-aside spectrum to an Incumbent. For those same five years, Canada expected its New Entrants to meet certain minimum rollout obligations. GTH, other New Entrants, and market commentators, all understood at the time of the AWS Auction that after this Five-Year Rollout Period was complete, New Entrants like GTH would be permitted to transfer their set-aside spectrum to an Incumbent. This comes as no surprise—this was, after all, Industry Canada's intention and understanding as well.

304. Yet, in direct contravention of this common understanding—and after having encouraged GTH to invest over C$ 1.3 billion into Canada's wireless telecommunications market—on the eve of the expiration of the Five-Year Rollout Period, Canada changed the rules governing license transfers. Through its new 2013 Transfer Framework, Canada made it clear that New Entrants would not be permitted to transfer their set-aside spectrum licenses (directly or indirectly) to the Incumbents.

305. By denying GTH the ability to transfer the set-aside spectrum licenses to an Incumbent despite the expiration of the Five-Year Rollout Period, Canada breached Article II(2)(a) of the BIT in two distinct ways by: (*i*) frustrating GTH's legitimate expectations; and (*ii*) subjecting GTH to unreasonable and arbitrary treatment. This was one of the several

measures that, altogether, cornered GTH's investment, leaving GTH with no rational option but to sell its investment to a non-incumbent for a fraction of its value.

a. Canada Breached Its Obligation To Afford Fair And Equitable Treatment By Frustrating GTH's Legitimate Expectation That It Would Be Permitted To Transfer Wind Mobile's Licenses To An Incumbent After The Five-Year Rollout Period

i. GTH Had The Legitimate Expectation That It Would Be Permitted To Transfer Wind Mobile's Licenses To An Incumbent After The Five-Year Rollout Period

306. Prior to the 2008 AWS Auction, Industry Canada consulted with the public on a proposed framework to govern the Auction of AWS spectrum licenses and the conditions of license. Industry Canada described that the over-arching objective of this Auction was to encourage new entry in the wireless market.[664]

307. With this objective in mind, Industry Canada sought feedback on whether to adopt *ex ante* measures to remove barriers to entry for potential New Entrants. Industry Canada explained that taking *ex ante* measures—such as setting aside spectrum for New Entrants or imposing spectrum aggregation limits on existing market participants—were different from the *ex post* reviews, which were the mandate of the Competition Bureau arising from mergers and market consolidation. It described the role of Industry Canada with respect to mergers as follows:

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[664] **Exhibit C-004**, AWS Auction Policy Framework, p. 4 ("*The measures being taken are intended to ensure an opportunity for entry by addressing the potential to exploit spectrum as an entry barrier*."); **Exhibit C-123**, Industry Canada, *Speech: Speaking Points – The Honourable Christian Paradis, PC, MP Minister of Industry, Telecommunications Decisions*, 14 March 2012, https://www.canada.ca/en/news/archive/2012/03/telecommunications-decisions.html (last visited 24 September 2017) ("[i]*n the last spectrum auction, held in 2008 our government took action to encourage new entry in the wireless market*").

> *Although the goals of merger policy are similar to those underlying set-asides and aggregation limits, there is a fundamental difference between the two that needs to be recognized. The goal of using set-asides and aggregation limits is intended to address concerns that new entrants have the opportunity to bid, as part of the competitive process, for the spectrum necessary for entry as a facilities-based carrier.*[665]

308. Industry Canada emphasized that the Competition Bureau, not Industry Canada, is the Government arm tasked with confirming whether a proposed merger may lessen competition in the wireless telecommunications market:

> *In a review of a merger matter, the [Competition] Bureau inquires into whether the merger is likely to cause a substantial lessening or prevention of competition relative to the circumstances that would be expected to prevail in the absence of the merger. In particular, a Bureau decision not to challenge a transaction should not be interpreted as a conclusion that the merging parties, or other firms in the affected industry, did not possess market power or that further profitable entry into the industry was not possible. It simply means that the Bureau determined that the merger would not likely increase the level of market power sufficiently to cause a competition concern relative to the pre-merger situation. As such, a Bureau decision not to challenge a merger should be viewed independently from a Department policy decision of using set-asides, aggregation limits or other measures designed to provide an opportunity for new entry to facilitate a more competitive market over what may currently exist.*[666]

309. In other words, when it came to the consolidation of market players in the wireless telecommunications market, Industry Canada was responsible for imposing *ex ante* measures to encourage a fertile environment for competition, while the Competition Bureau was responsible for *ex post* merger reviews to determine whether the market would remain competitive. Industry Canada concluded that "[t]*he current spectrum licencing process recognizes the complementary nature and the division of responsibilities among*

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665 **Exhibit C-050**, AWS Auction Consultation, Part II, § 2.4.3.

666 **Exhibit C-050**, AWS Auction Consultation, Part II, § 2.4.4.

Industry Canada, the CRTC and the Competition Bureau."[667] Thus, contrary to the role it eventually embraced, at the outset, Industry Canada represented that it would not engage in any *ex post* review of a spectrum transfer—instead, that role was reserved for the Competition Bureau, which would exercise its expertise in applying well-known principles of competition policy.

310. Recognizing that the "*unavailability of spectrum . . . constitutes a barrier to market entry*," Industry Canada sought comments on whether to set-aside spectrum for New Entrants alone.[668] While it knew that such a measure might risk "*unviable entry*," Industry Canada observed that "[p]*otential adverse impact (i.e. unviable entry)* ***can be corrected by market forces should a new entrant fail.***"[669] Industry Canada contemplated that the 2008 AWS Auction might result in multiple New Entrants in the market, or none at all.[670]

311. While Canada had previously imposed time limitations on the transfer of spectrum (for example, in its 1995 award of PCS licenses),[671] at this stage, Canada did not contemplate such a restriction.[672] Rather, in its June 2007 Spectrum Policy Framework, which followed

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667 **Exhibit C-050**, AWS Auction Consultation, Part II, § 2.7. Industry Canada described that "[c]*reating an opportunity for new entry at the time of auction is, in many respects, the only time to introduce further competition in the wireless market*" and "*consideration for setting aside spectrum for new entrants is proactive and could reduce the exclusive reliance on ex post regulation to address competition issues*." **Exhibit C-050**, AWS Auction Consultation, Part II, § 2.4.3.

668 **Exhibit C-050**, AWS Auction Consultation, p. 22. Industry Canada described that "[c]*reating an opportunity for new entry at the time of auction is, in many respects, the only time to introduce further competition in the wireless market*" and "*setting aside spectrum for new entrants is proactive and could reduce the reliance on ex post regulation to address competition issues*." **Exhibit C-050**, AWS Auction Consultation, p. 21.

669 **Exhibit C-050**, AWS Auction Consultation, Part II, § 2.7 (emphasis added).

670 **CWS-Connolly**, ¶ 13.

671 *See supra* Part III.A.2.

672 *See* **Exhibit C-244**, Mobilicity Litigation – Statement of Defence, ¶ 49 ("*As for a moratorium on transfers of licences set-aside for new entrants to large wireless service providers, this measure was not included in the* Auction Consultation Paper. *Rather, it was proposed by Québecor in May 2007 in its submissions*.").

the Consultation, Industry Canada expressly recognized "*the importance of relying on market forces in spectrum management, to the maximum extent feasible*," including "*the removal of barriers to secondary markets for spectrum authorizations.*"[673] Accordingly, the Spectrum Policy Framework stated that "*regulation, where required, should be minimally intrusive, transparent, efficient and effective.*"[674] Thereafter, the Spectrum Licensing Procedure confirmed that spectrum licenses assigned through an auction process enjoy the "*privilege*" of "*enhanced transferability and divisibility rights*."[675] In Canada's words, this meant that "[t]*hese spectrum licenses 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*."[676]

312. One month later, in its AWS Auction Policy Framework, Industry Canada announced its "*final*" policy decisions with respect to the upcoming 2008 AWS Auction and the conditions attached to AWS licenses.[677] In this Policy Framework, Industry Canada introduced the five-year restriction on the transfer of AWS set-aside spectrum to an Incumbent.[678] The purpose of this restriction was clear: to prevent the purchase of set-aside spectrum by investors seeking only to engage in arbitrage by selling cheaply bought spectrum to an Incumbent who would pay a higher price. During the consultation process, QMI, a prospective New Entrant, had proposed this five-year restriction to ensure that

673 **Exhibit C-052**, Spectrum Policy Framework, § 4.4.

674 **Exhibit C-052**, Spectrum Policy Framework, § 4.4.

675 **Exhibit C-003**, Spectrum Licensing Procedure, § 5.6.

676 **Exhibit C-003**, Spectrum Licensing Procedure, § 5.6.

677 **Exhibit C-004**, AWS Auction Policy Framework, p. 1.

678 **Exhibit C-004**, AWS Auction Policy Framework, p. 6.

spectrum was "*rapidly and effectively used by new entrants*,"[679] and other commentators concurred.[680] Industry Canada agreed and adopted QMI's proposal by imposing the Five-Year Rollout Period.[681] During the Five-Year Rollout Period, Industry Canada simultaneously barred New Entrants from transferring set-aside spectrum to an Incumbent for the first five years of the license while, for that same period, requiring New Entrants to meet certain minimum rollout targets (which would be taken into account when considering applications for license renewal to extend in-territory roaming beyond the initial five-year period).[682] As Industry Canada later confirmed, "[r]*estrictions on secondary market transactions and transferability on set-aside spectrum may need to be imposed* ***for a specific time frame*** *to limit opportunities for economic arbitrage of spectrum licenses*."[683] It explained that the five-year restriction on transfer imposed during the 2008 AWS Auction was "*intended to encourage licensees* ***to put the spectrum to use and to deter acquisition of spectrum licenses by speculators*** *and those whose intent is to preclude access to the spectrum by their competitors*."[684] This restriction was designed specifically

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679 **Exhibit C-051**, QMI Submission, p. 7. *See also* **Exhibit C-244**, Mobilicity Litigation – Statement of Defence, ¶¶ 49, 61.

680 **Exhibit C-054**, DAVE Reply; **Exhibit C-053**, Niagara Networks Reply.

681 **Exhibit C-244**, Mobilicity Litigation – Statement of Defence, ¶ 49 ("*As for a moratorium on transfers of licences set-aside for new entrants to large wireless service providers, this measure was not included in the* Auction Consultation Paper. *Rather, it was proposed by Québecor in May 2007 in its submissions*.").

682 **Exhibit C-004**, AWS Auction Policy Framework, pp. 6, 10; **Exhibit C-010**, Wind Mobile Licenses, Conditions 2, 12.

683 **Exhibit C-114**, Industry Canada, *Decisions on a Band Plan for Broadband Radio Service (BRS) and Consultation on a Policy and Technical Framework to License Spectrum in the Band 2500-2690 MHz*, § 4.1.2 (emphasis added).

684 **Exhibit C-122**, Industry Canada, *Policy and Technical Framework, Mobile Broadband Services (MBS) – 700 MHz Band, Broadband Radio Services (BRS) – 2500 MHZ Band (SMSE-002-12)* (hereinafter "**MBS/BRS Policy And Technical Framework**"), ¶ 142 (emphasis added). *See also* **Canada's Request for Bifurcation**, ¶ 9 ("*This condition was aimed at avoiding circumvention of the set-aside and was consistent with the legislative objectives of achieving reliable and affordable telecommunications services and enhanced competitiveness*."). Similarly, in its MBS/BRS Policy Framework, Industry Canada decided, with respect to its imposition of a spectrum cap:

to deter speculative purchasers who sought to engage in arbitrage rather than deploy spectrum.[685]

313. Given this purpose, everyone—including Industry Canada, GTH, other New Entrants, and market commentators—understood and expected that this five-year restriction on the transfer of set-aside spectrum to an Incumbent would last only five years, and that after the Five-Year Rollout Period, New Entrants would be allowed to transfer that spectrum to an Incumbent.[686] Mr. Connolly confirms that Industry Canada's intention was that if New Entrants invested in spectrum, but were unsuccessful in their venture, they could transfer that spectrum in the market to a willing buyer—including, after five years, an Incumbent.[687] He explains that Industry Canada understood that this meant there was a chance that no New Entrants would remain following the end of the five-year period.[688]

314. GTH's corollary expectation that Canada would not seek to undermine this condition was supported by the general "*enhanced transferability*" rights Industry Canada attributed to spectrum licenses purchased at an auction,[689] and its overarching policy to "*facilitat*[e] *secondary markets for spectrum authorizations*," and to regulate only "*where required*," in

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"*restrictions on secondary market transactions, including transferability of licences, should be imposed for specific time frames post-auction in order to limit the opportunities for a company to purchase another company's licence in order to circumvent the cap.* ***Retaining the spectrum caps for five years from the date of issuance of the licence would reduce the attractiveness of the licences to speculators yet would permit market adjustments within a reasonable period of time.***" **Exhibit C-122**, MBS/BRS Policy And Technical Framework, ¶¶ 144-46 (emphasis added).

685 **CWS-Connolly**, ¶ 13.

686 *See supra* Part IV.C.

687 **CWS-Connolly**, ¶ 13.

688 **CWS-Connolly**, ¶ 13.

689 Without the stay, transfer rights were subject only "*to the conditions stated on the licence and other applicable regulatory requirements*." *See* **Exhibit C-003**, Spectrum Licensing Procedure, § 5.6.

which case regulation should be "*minimally intrusive, transparent, efficient and effective.*"[690] Moreover, past practice showed that Industry Canada would allow the sale of a New Entrant to an Incumbent after a time-limited restriction on license transfer had expired.[691]

315. Thus, the plain language of this five-year restriction on transfer as memorialized in Wind Mobile's set-aside spectrum licenses was unambiguous. Condition 2 of the Licenses provided:

> *. . . Licenses 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. . . .*[692]

316. If Canada had intended for this "*period of 5 years*" to be indefinite—as had been suggested by one party during the consultation period[693]—it could have done so by removing that phrase. But it did not.

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690 **Exhibit C-052**, Spectrum Policy Framework, § 4.4 (emphasis added).

691 *See, e.g.*, Clearnet and Microcell. *See supra* Part III.A.2.

692 **Exhibit C-010**, Wind Mobile Licenses, Condition 2 (emphasis added).

693 **Exhibit C-055**, Cybersurf Reply, ¶¶ 11-12 ("*In order for the licensing of spectrum allocated through set-asides to continue promoting the pro-competitive objectives of a set-aside policy, a condition of licence should exist that prevents the spectrum in question from falling into the hands of incumbent mobile wireless carriers or their affiliates, even in cases of the division and/or transfer of such spectrum. In other words, in order to promote a pro-competitive policy that could be defeated or diminished if spectrum aggregation occurs over time after the completion of the auction, set-asides should continue for an indeterminate period*.").

ii. GTH Relied On Canada's Representations In Making Its Decision To Invest

317. This condition that a New Entrant's ability to transfer set-aside spectrum to an Incumbent would last only five years was a critical component for investors contemplating whether to participate in the 2008 AWS Auction. GTH relied on Canada's assurance that it would be permitted to transfer Wind Mobile's licenses to an Incumbent after the Five-Year Rollout Period. As explained by Mr. Dobbie, who was part of the GTH team evaluating the investment opportunity in Canada, "[i]*n my view, GTH would not have been likely to invest in Canada, and certainly not at the price we bid in the Auction, had we been informed at the outset that we would not be allowed to sell our investment to an Incumben*t."[694]

318. Further, GTH's expectation continued well into 2013 and remained unquestioned until Canada introduced the 2013 Transfer Framework (discussed below).[695]

319. Canada expected GTH and other investors to rely on the provision which allowed New Entrants to sell their set-aside spectrum licenses after the end of the Five-Year Rollout Period,[696] and it is hardly surprising that GTH did so.[697] A wireless telecommunications venture is dependent on its spectrum licenses—often described as the "*lifeblood*" of a wireless telecommunications company.[698] Therefore the licensees ability to transfer these

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694 **CWS-Dobbie**, ¶ 41.

695 *See supra* Part V.C.2.d; **CWS-Dry**, ¶¶ 8-9, 12-13, 20.

696 *See* **CWS-Connolly**, ¶ 13.

697 *See* **CWS-Dobbie**, ¶¶ 10, 40-41.

698 *See, e.g.*, **Exhibit C-171**, Rita Trichur & Boyd Erman, *Ottawa moving quickly to finalize wireless rules*, THE GLOBE & MAIL, 15 April 2013, https://beta.theglobeandmail.com/report-on-business/ottawa-moving-quickly-to-finalize-wireless-rules/article11197998/ (last visited 24 September 2017) (describing spectrum as "*the very lifeblood of the wireless industry*").

licenses are of paramount importance in determining future strategic options for a prospective investment (including merger and exit), and ultimately its overall value.[699] A vague or indefinite restriction on a licensee's transfer rights would accordingly have a substantial impact on the prospective investor's decision to invest.[700] Mr. Dry confirms that without a stable and clear liquidity right attached to a spectrum license, it would be difficult to justify a decision to invest in a New Entrant given the nature of the wireless telecommunications market in Canada.[701]

320. Canada was aware of the significance to a prospective investor of stable and transparent policies and conditions of license. In its October 2001 *Framework for Spectrum Auctions in Canada*, the first sentence explained that bidders would have "*the fullest possible knowledge of the spectrum at issue and the auction procedures and rules prior to the auction*."[702] Canada explained:

> *Understanding exactly what is being auctioned is very important for bidders to develop business plans, secure adequate financing and develop a bidding strategy. While upholding the status of radio spectrum as a public natural resource, it is important to provide bidders, and subsequently licensees, with a well-defined set of license 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.*[703]

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699 *See* **Exhibit C-165**, Rogers, *Comments of Rogers Communications: Consultation on considerations Relating to Transfers, Divisions, and Subordinate Licensing of Spectrum Licences (DGSO-002-13)*, 3 April 2013, ¶¶ 23-24 ("*From the bidder's perspective, certainty of terms is essential to the process of valuing the spectrum and considering how much to bid in a particular market. . . . One of the most important rights associated with auctioned spectrum is the right to sell it in the aftermarket*."); **CWS-Dry**, ¶ 14.

700 *See* **CWS-Dry**, ¶ 14.

701 *See* **CWS-Dry**, ¶ 14.

702 **Exhibit C-041**, 2001 Spectrum Auction Framework, Framework Summary, ¶ 1.

703 **Exhibit C-041**, 2001 Spectrum Auction Framework, § 4. *See also* **Exhibit C-038**, 1998 Spectrum Auction Framework, § 6 ("*Understanding exactly what is being auctioned will be very important for bidders to secure*

321. Industry Canada was aware that new investors would rely on Industry Canada's representation that it could transfer its set-aside spectrum after five years. As Mr. Connolly explains:

> *The five-year period was considered long enough to mitigate against speculation and to provide an incentive to New Entrants to build networks and offer competing services, while affording New Entrants the expectation of the ability to exit the market and divest the licenses after five years should they not succeed. We were fully aware that an indefinite ban on any sale of set aside spectrum would deter New Entrants from bidding in the AWS Auction.*[704]

322. By introducing the conditions Industry Canada knew were necessary to encourage new investment, Industry Canada invited GTH and other investors to rely on this framework and to spend billions of dollars on spectrum and the infrastructure necessary to rollout their networks. New Entrants felt safe in the knowledge that if they failed, they had a viable path to exit the market after five years. If Canada had informed GTH, as it would in 2013, that GTH would not be allowed to transfer these set-aside licenses to an Incumbent after the Five-Year Rollout Period had expired, GTH would not have invested in Canada in the first place.[705]

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adequate financing and to develop a bidding strategy. While upholding the status of radio spectrum as a public natural resource, it is important to provide bidders, and subsequently licensees, ***with an attractive package 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*." (emphasis added)).

704 **CWS-Connolly**, ¶ 13.

705 **CWS-Dobbie**, ¶ 41. In *Micula et al. v. Romania*, the tribunal observed that the regulatory regime granting tax incentives was designed to entice investments and that without the guarantee that this would continue for ten years, Romania would not have succeeded in attracting investments in the first place. **Exhibit CL-070**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶¶ 677-78. *See also* **Exhibit CL-060**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, ¶ 227 ("*In the instant cases, it should be emphasized that the expectations of the Claimants with respect to their investment in the water and sewage system of Buenos Aires did not suddenly and surprisingly come into their minds the way Athena sprang from the head of Zeus. Argentina through its laws, the treaties it signed, its government statements, and*

323. As a direct result of Canada's representations with respect to the terms and conditions that would govern the 2008 AWS Auction, including the time-limited restriction on transfer of set-aside spectrum to an Incumbent, the auction was a resounding success for Canada. As Minister Prentice announced immediately after the auction, the 2008 AWS Auction had "*exceeded our expectations*" and "[t]*he auction generated almost $4.3 billion in revenues for the Government of Canada*."[706]

iii. Canada Frustrated GTH's Legitimate Expectations When It Revised The Transfer Framework And Blocked The Sale Of Wind Mobile's Licenses To An Incumbent

324. Nearly four years after Wind Mobile's set-aside spectrum licenses were issued and after GTH had invested over C$ 1 billion in Canada, on 7 March 2013, Canada released its 2013 Transfer Consultation requesting comments on its "*propos*[al] *to revise CPC-2-1-23* [the 2007 Spectrum Licensing Procedure] *which applies to all spectrum licenses, in order to indicate the specific criteria considered and process used when spectrum license transfer applications are reviewed*."[707] This consultation followed contemporaneous media reports that Shaw and Rogers to had agreed to a purchase option of Shaw's set-aside spectrum

especially the elaborate legal framework which it designed and enacted, deliberately and actively sought to create those expectations in the Claimants and other potential investors in order to obtain the capital and technology that it needed to revitalize and expand the Buenos Aires water and sewage system.").

706 **Exhibit C-081**, Industry Canada, *News Release: 15 Companies Bid Almost $4.3 Billion for Licences for New Wireless Services*, 21 July 2008, https://www.canada.ca/en/news/archive/2008/07/15-companies-bid-almost-4-3-billion-licences-new-wireless-services.html (last visited 24 September 2017).

707 **Exhibit C-152**, 2013 Transfer Consultation, ¶ 13.

licenses for Rogers and that GTH was also contemplating a sale of Wind Mobile to an Incumbent upon the expiration of the Five-Year Rollout Period.[708]

325. After a perfunctory consultation process,[709] and mere months before the Five-Year Rollout Period was set to expire, Canada issued its 2013 Transfer Framework[710] and 2013 Spectrum Licensing Procedure.[711] These documents fundamentally revised the conditions existing at the time of the 2008 AWS Auction and the clear terms of Wind Mobile's licenses in at least four ways:

(a) Canada stripped spectrum licenses assigned through an auction of their "*enhanced transferability*" rights;[712]

(b) Canada revised its policy documents to emphasize that the Minister had the authority to refuse any and all transfer requests;[713]

(c) Canada memorialized its new policy objective to create or maintain "***four wireless providers in every region of the country***" and that it "[would] *not hesitate to use any and every tool at its disposal*" to achieve this objective;[714] and

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[708] *See, e.g.*, **Exhibit C-141**, Rita Trichur & Tim Kiladze, *Buyout of Wind Mobile exec changes telecom climate*, THE GLOBE & MAIL, 18 January 2013, https://www.theglobeandmail.com/globe-investor/buyout-of-wind-mobile-exec-changes-telecom-climate/article7514399/ (last visited 24 September 2017).

[709] The speed with which the Government moved to implement its new transfer framework was surprising compared to the years it took the Government to address the mandatory roaming and tower/site sharing rules.

[710] **Exhibit C-031**, 2013 Transfer Framework.

[711] **Exhibit C-206**, 2013 Spectrum Licensing Procedure.

[712] *See supra* V.C.2.d. *Cf.* **Exhibit C-003**, Spectrum Licensing Procedure, § 5.6, *to* **Exhibit C-206**, 2013 Spectrum Licensing Procedure, § 5.6.

[713] *See supra* V.C.2.d. *Cf.* **Exhibit C-003**, Spectrum Licensing Procedure, § 5.6, *to* **Exhibit C-206**, 2013 Spectrum Licensing Procedure, § 5.6, which now adds that license transfer are subject to "*review and approval by Industry Canada*" and "[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*."

[714] *See, e.g.*, **Exhibit C-119**, Industry Canada, *News Release: Harper Government Releases Spectrum Licence Transfer Framework*, 28 June 2013, https://www.canada.ca/en/news/archive/2013/06/harper-government-releases-spectrum-licence-transfer-framework.html (last visited 24 September 2017); **Exhibit C-194**, Industry Canada, *News Release: Harper Government Protecting Consumers and Increasing Competition in Canadian*

(d) Canada added new criteria to its consideration of whether a transfer request would be granted, including whether the transfer request would result in "[u]*ndue spectrum concentration*."[715]

326. As noted above, this new Transfer Framework gave Minister Paradis unfettered discretion to approve and reject transfer applications for any reason.[716] In exercising this discretion, Minister Paradis and the Government led by Prime Minister Stephen Harper announced that even after the expiration of the Five-Year Rollout Period it would not permit New Entrants to transfer their spectrum to the Incumbents. Minister Paradis announced before the House of Commons:

> *Mr. Speaker, today I announced that any proposed wireless transfer resulting in undue spectrum concentration and therefore less competition will not be approved.* ***Spectrum set aside for new entrants was never intended to be transferred to incumbents and as such will not be approved now, nor will it likely be in the future****.*
>
> *Our Conservative government will not hesitate to use any and every tool at its disposal to support greater competition in the market and protect Canadian consumers.*[717]

327. In announcing its new Transfer Framework, Industry Canada made everyone aware that any transfer request that risked its new fourth player policy would be denied. In other

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Wireless Sector, 4 June 2013, https://www.canada.ca/en/news/archive/2013/06/harper-government-protecting-consumers-increasing-competition-canadian-wireless-sector.html (last visited 24 September 2017); **CWS-Connolly**, ¶ 15.

715 *See* **Exhibit C-031**, 2013 Transfer Framework, **CWS-Connolly**, ¶ 15.

716 *See* **Exhibit C-031**, 2013 Transfer Framework, ¶ 40(h) (allowing Industry Canada to take into account "*any other factors relevant to the policy objectives outlined in this Framework that may arise from the Licence Transfer*"). Unsurprisingly, set-aside AWS licenses auctioned after the release of the 2013 Transfer Framework no longer contained the five-year transfer restriction—such a condition was no longer necessary. *See* **Exhibit C-230**, 2014 AWS-3 Technical, Policy, and Licensing Framework, § 9.2.

717 **Exhibit C-195**, House of Commons Debates, Hansard 146(262), 41st Parliament, 1st Session, 4 June 2013, p. 17647.

words, the more successful a New Entrant was, the less likely it would be permitted by Industry Canada to transfer its spectrum for the highest value.

328. When Canada introduced this new framework, Canada understood that it was fundamentally altering the existing framework to achieve its desired outcome. First, this fourth player policy was a substantial deviation from Canada's original intention and objective behind the 2008 AWS Auction, which was to facilitate and sustain market entry to improve competition, but not guarantee it.[718] While Minister Paradis claimed that a fourth player was always the objective of the 2008 AWS Auction, as Mr. Connolly describes, "*this was revisionist history*."[719]

329. Second, in a "*secret*" December 2012 internal Industry Canada presentation addressed to the Deputy Minister, Industry Canada described its "*current treatment*" of transfer requests.[720] In the presentation, it described that, other than the five-year restriction, "*there are no other specific conditions*" relevant to spectrum transfer.[721] It emphasized that to deviate from this would require "*changing the current IC approach to license transfer requests*":

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[718] **CWS-Connolly**, ¶ 17.

[719] **CWS-Connolly**, ¶ 15.

[720] **Exhibit C-131**, Email from Rebecca Guillemette to Cindy-Lee Cook, et al., 10 December 2012, *attaching* Industry Canada, *Wireless Telecommunications Sector: Status Update and Implications*, 10 December 2012 [ATI Document], Slide 14.

[721] **Exhibit C-131**, Email from Rebecca Guillemette to Cindy-Lee Cook, et al., 10 December 2012, *attaching* Industry Canada, *Wireless Telecommunications Sector: Status Update and Implications*, 10 December 2012 [ATI Document], Slide 14.

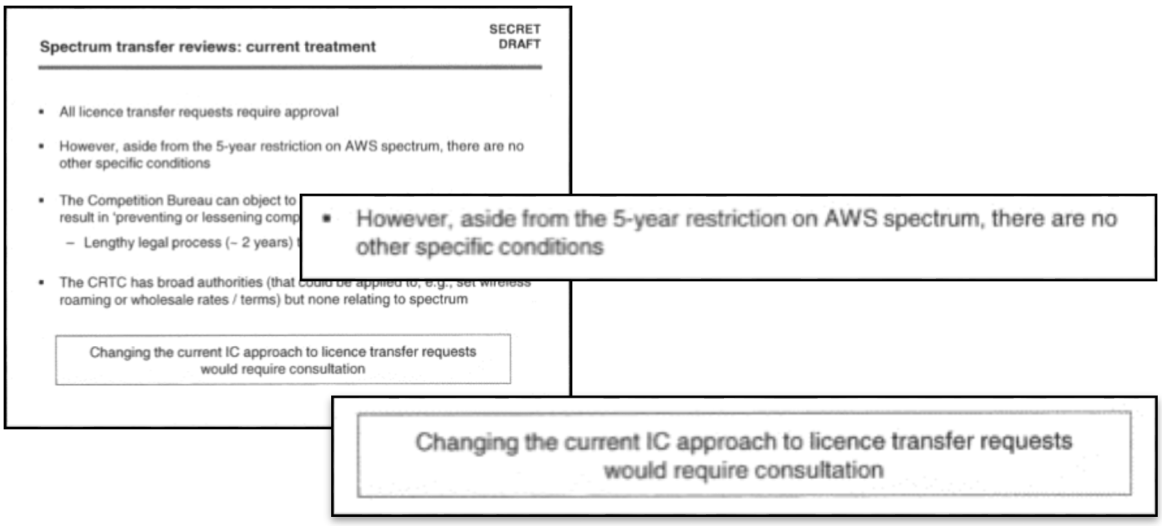

Figure 5: Slide from internal Industry Canada presentation. **Exhibit C-131**, Email from Rebecca Guillemette to Cindy-Lee Cook, et al., 10 December 2012, *attaching* Industry Canada, *Wireless Telecommunications Sector: Status Update and Implications*, 10 December 2012 [ATI Document], Slide 14.

330. Industry Canada further recognized that the "*Status Quo*" for license transfer requests was one that "[w]*ould leave* [the] *Competition Bureau to review spectrum license transfer impacts on competition*."[722] This was consistent with the distinction Industry Canada recognized between the role of Industry Canada in imposing *ex ante* measures to facilitate competition and the Competition Bureau's *ex post* measures in reviewing mergers.[723] It worried, however, that "[i]*f the Bureau cannot or does not pursue a case or is unsuccessful, it would threaten the sufficient availability of spectrum for a 4th player*."[724]

[722] **Exhibit C-131**, Email from Rebecca Guillemette to Cindy-Lee Cook, et al., 10 December 2012, *attaching* Industry Canada, *Wireless Telecommunications Sector: Status Update and Implications*, 10 December 2012 [ATI Document], Slide 15.

[723] **Exhibit C-050**, AWS Auction Consultation, § 2.4.3.

[724] **Exhibit C-131**, Email from Rebecca Guillemette to Cindy-Lee Cook, et al., 10 December 2012, *attaching* Industry Canada, *Wireless Telecommunications Sector: Status Update and Implications*, 10 December 2012 [ATI Document], Slide 15.

331. In the new 2013 Transfer Framework, Industry Canada "*encourage*[d] *potential Applicants to seek informal, non-binding advice prior to requesting a transfer of spectrum license*."[725] As described at Part V.C.2, the Government made clear to Wind Mobile and the Incumbents that a transfer of Wind Mobile's licenses to the Incumbents would not be permitted. By November 2013, internal counsel for VimpelCom was informed by Government representatives, in unequivocal terms, that any transfer of Wind Mobile's licenses to an Incumbent [redacted] would not be approved.[726]

332. In sum, by enacting the 2013 Transfer Framework and denying GTH its right to sell Wind Mobile's licenses to an Incumbent after the Five-Year Rollout Period, Canada frustrated GTH's legitimate expectations by subverting a critical condition GTH relied on when it made the decision to invest in Canada.[727] This is an unambiguous breach of Canada's obligation to accord GTH's investment FET under the BIT.

333. Similarly, in *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, the tribunal found that legal and regulatory frameworks, particularly where the frameworks have been established by the State to encourage foreign investment, can give rise to legitimate expectations of the investor protected under the FET standard.[728] In *Suez*, Argentina enacted laws and regulations privatizing its water and

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[725] **Exhibit C-031**, 2013 Transfer Framework, ¶ 36.

[726] **CWS-Dry**, ¶ 28.

[727] **Exhibit CL-030**, *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶ 611 (finding breach of FET where the respondent's conduct resulted in the "*evisceration of the arrangements in reliance upon with* [sic] *the foreign investor was induced to invest*").

[728] **Exhibit CL-060**, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, ¶¶ 231, 237-38.

sewage systems, setting out the rights and obligations of concessionaires, creating a tariff regime, and encouraging foreign investment by enacting measures, including tying the value of the peso to the dollar.[729] Claimants invested in its concession in Argentina, only to have Argentina materially alter this regulatory regime.[730] The tribunal found Claimants had legitimate expectations based upon its concession and the legal framework in place at the time of its investment:

> *Like any rational investor the Claimants attached great importance to the tariff regime stipulated in the Concession Contract and the regulatory framework. . . . It was in reliance on that legal framework that the Claimants invested substantial funds in Argentina. And Argentina certainly recognized at the time it granted the Concession to the Claimants that without such a belief in the reliability and stability of the legal framework the Claimants—indeed no investor—would ever have agreed to invest in the water and sewage system of Buenos Aires.*[731]

334. Likewise, in *Ioan Micula v. Romania,* the tribunal found respondent had breached its obligation to accord FET protection when the government set up a regime with incentives for a period of 10-years to encourage investment in an otherwise undesirable market, and then dismantled that regime.[732] The *Micula* tribunal found a breach of fair and equitable treatment despite finding that, unlike here, the respondent's actions were reasonably tailored to achieve rational goals.[733] The tribunal observed that "*it cannot be fair and*

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729 **Exhibit CL-060**, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, ¶¶ 29-30.

730 **Exhibit CL-060**, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, ¶¶ 44–52.

731 **Exhibit CL-060**, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, ¶ 231.

732 **Exhibit CL-070**, *Ioan Micula et al. v. Romania,* ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶¶ 677-89.

733 **Exhibit CL-070**, *Ioan Micula et al. v. Romania,* ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 827.

equitable for a state to offer advantages to investors with the purpose of attracting investment in an otherwise unattractive region . . . and then maintain the formal shell of the regime but eviscerate it of all (or substantially all) content."[734]

b. Canada Breached Its Obligation To Afford Fair And Equitable Treatment By Unreasonably and Arbitrarily Blocking GTH From Transferring Wind Mobile's Licenses To An Incumbent After Five Years

335. By blocking GTH's ability to transfer Wind Mobile's licenses to an Incumbent, Canada has committed a second and independent breach of FET, unlawfully subjecting GTH to unreasonable and arbitrary treatment. Canada's decision to effectively bar GTH from transferring its investment to an Incumbent was unattached to any credible policy objective—it was instead a means for Canada to deflect public criticism that its efforts to sustain competition in the wireless market had failed.

336. With public announcements regarding the sale of Shaw's set-aside spectrum licenses to Rogers, the sale of Mobilicity to Telus, and rampant speculation that Wind Mobile might follow, the media and analysts declared that market consolidation in the hands of the Incumbents was, once again, inevitable. To the public, it appeared that Canada's efforts to increase competition had, yet again, fallen short. It was in this environment that Canada announced the new 2013 Transfer Framework and its new policy that it would maintain a fourth player and do so at any cost.[735]

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[734] **Exhibit CL-070**, *Ioan Micula et al. v. Romania,* ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 687.

[735] *See supra* Part V.C.2.

337. This fourth player policy emphasized a simplistic (and as set forth below, incorrect) notion of increased competition: the existence of one New Entrant in addition to the three Incumbents. However, to assuage public concern, this became the cornerstone of Canada's media campaign. Canada, Minister Paradis declared, was putting consumers first and would not hesitate to use "*any and every tool at* [their] *disposal*" to achieve its objectives.[736] Among other announcements:

(a) Canada issued a News Release to announce the 2013 Transfer Consultation entitled "*Harper Government Puts Consumers First in Telecommunications Plan*." Minister Paradis announced that through this consultation, "*our government is delivering on our promise to use the upcoming wireless spectrum auctions to promote* ***four competitors*** *in each region of the country*."[737]

(b) Prior to the release of the 2013 Transfer Framework, Minister Paradis issued an "*Important Announcement*" that Canada's efforts to promote wireless competition "*are paying off*" and that Canada "*will not allow this progress to be lost or undermined*."[738] He announced both that: (*i*) TELUS's application to obtain Mobilicity's AWS spectrum licenses had been denied; and (*ii*) a new transfer framework would be released imminently which provided that "*going forward, proposed spectrum transfers—including AWS spectrum transfers—that will result*

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[736] **Exhibit C-194**, Industry Canada, *News Release: Harper Government Protecting Consumers and Increasing Competition in Canadian Wireless Sector*, 4 June 2013, https://www.canada.ca/en/news/archive/2013/06/harper-government-protecting-consumers-increasing-competition-canadian-wireless-sector.html (last visited 24 September 2017); **Exhibit C-199**, Industry Canada, *News Release: Harper Government Releases Spectrum Licence Transfer Framework*, 28 June 2013, https://www.canada.ca/en/news/archive/2013/06/harper-government-releases-spectrum-licence-transfer-framework.html (last visited 24 September 2017).

[737] **Exhibit C-157**, Industry Canada, *News Release: Harper Government Puts Consumers First in Telecommunications Plan*, 7 March 2013, https://www.canada.ca/en/news/archive/2013/03/harper-government-puts-consumers-first-telecommunications-plan.html (last visited 24 September 2017) (emphasis added); **Exhibit C-156**, Industry Canada, *Speech: Speaking Points – The Honourable Christian Paradis, PC, MP, Minister of Industry, New measures to increase competition in the wireless sector*, 7 March 2013, https://www.canada.ca/en/news/archive/2013/03/new-measures-increase-competition-wireless-sector.html (last visited 24 September 2017).

[738] **Exhibit C-193**, Industry Canada, *Speech: Speaking Points – The Honourable Christian Paradis, PC, MP, Minister of Industry, Telecommunications Announcement*, 4 June 2013, https://www.canada.ca/en/news/archive/2013/06/telecommunications-announcement.html (last visited 24 September 2017).

in undue concentration and therefore reduce competition will not be permitted."[739] To conclude, he stated:

> *But let me be clear—**our government will not hesitate to use any and every tool at our disposal to**:*
>
> - *protect consumers;*
> - *promote competition; and*
> - ***promote at least four wireless providers in every region of the country***.[740]

(c) In the accompanying News Release, entitled "*Harper Government Protecting Consumers and Increasing Competition in Canadian Wireless Sector*," Minister Paradis described: "*We are seeing Canadian consumers benefit from our policies and we will not allow the sector to move backwards*."[741] He reemphasized, "*I will not hesitate to use any and every tool at my disposal to support greater competition in the market*."[742]

(d) In describing the release of the 2013 Transfer Framework, Minister Paradis proclaimed: "*The Harper Government is committed to promoting **at least four wireless providers in every region of the country to support greater competition in the market**. . . The Harper Government will not hesitate to use any and every tool at its disposal to protect Canadian consumers and to promote competition*."[743]

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739 **Exhibit C-193**, Industry Canada, *Speech: Speaking Points – The Honourable Christian Paradis, PC, MP, Minister of Industry, Telecommunications Announcement*, 4 June 2013, https://www.canada.ca/en/news/archive/2013/06/telecommunications-announcement.html (last visited 24 September 2017).

740 **Exhibit C-193**, Industry Canada, *Speech: Speaking Points – The Honourable Christian Paradis, PC, MP, Minister of Industry, Telecommunications Announcement*, 4 June 2013, https://www.canada.ca/en/news/archive/2013/06/telecommunications-announcement.html (last visited 24 September 2017) (emphasis added).

741 **Exhibit C-194**, Industry Canada, *News Release: Harper Government Protecting Consumers and Increasing Competition in Canadian Wireless Sector*, 4 June 2013, https://www.canada.ca/en/news/archive/2013/06/harper-government-protecting-consumers-increasing-competition-canadian-wireless-sector.html (last visited 24 September 2017).

742 **Exhibit C-194**, Industry Canada, *News Release: Harper Government Protecting Consumers and Increasing Competition in Canadian Wireless Sector*, 4 June 2013, https://www.canada.ca/en/news/archive/2013/06/harper-government-protecting-consumers-increasing-competition-canadian-wireless-sector.html (last visited 24 September 2017).

743 **Exhibit C-194**, Industry Canada, *News Release: Harper Government Protecting Consumers and Increasing Competition in Canadian Wireless Sector*, 4 June 2013, https://www.canada.ca/en/news/archive/2013/06/harper-government-protecting-consumers-increasing-competition-canadian-wireless-sector.html (last visited 24 September 2017) (emphasis added).

338. Despite Minister Paradis' best efforts to claim as such, no fourth player policy existed at the time of the 2008 AWS Auction.[744] Moreover, Canada adopted its new Transfer Framework prohibiting undue spectrum concentration and its fourth player policy purportedly in the name of increasing competition. However, as Canada has acknowledged, these elements are in any event unrelated to increased competition. The June 2010 INDU Report observed that:

> *High levels of concentration for mobile networks are the norm, rather than the exception. Drawing a link between Canada's relatively poor performance in terms of cellular mobile subscribers and the level of concentration in the industry should be made cautiously given that many countries that have similar levels of concentration in the mobile network operators have high cellular mobile penetration (e.g., Germany, Finland and New Zealand).*[745]

339. On this point, the Incumbents and New Entrants could agree: this new Transfer Framework and fourth carrier policy were untethered to any evidence that either would promote or facilitate competition.[746] As Mr. Connolly describes, "*this emphasis on a fourth carrier was, in my view, irrational given that ultimately the market dictates how many service providers are viable in a given market and not government fiat*."[747]

340. Industry Canada's own internal presentation summarizing the justification of its new fourth carrier policy offers no concrete justification as to how the existence of a fourth carrier

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744 **CWS-Connolly**, ¶ 15.

745 **Exhibit C-112**, INDU 2010 Report, p. 19.

746 *See, e.g.*, **Exhibit C-204**, Email from Victor Hwei to Carsten Revsbech, et al., 25 July 2013, *attaching* Bell, *Wireless policy loopholes hurt Canada and Canadians*, July 2013, and Bell, *An open letter to all Canadians*. *See also* **Exhibit C-173**, *Paradis' four-carrier policy may mean blocking Wind or Mobilicity sale, and new incentives*, THE WIRE REPORT, 18 April 2013.

747 **CWS-Connolly**, ¶ 15.

might increase competition.[748] Without any rational relationship between these new policies and Canada's stated objective of increasing competition in the wireless sector, Canada's blocking of GTH's ability to sell its set-aside spectrum to an Incumbent on the basis of these policies was arbitrary and unreasonable.[749]

341. What is more, it was redundant for Industry Canada to exercise authority to monitor *ex post* transactions related to the consolidation of market players. As Industry Canada had itself made clear at the time of the 2008 AWS Auction, it was the Competition Bureau's responsibility to regulate *ex post* competition in the telecommunications market.[750]

342. Yet through the release of the new Transfer Framework, Industry Canada effectively reserved for itself complete authority to control the *ex post* consolidation of market players by rejecting transfers of spectrum at its own discretion on the basis of broad and ultimately arbitrary criteria. As previously explained, Canada was worried that this "*Status Quo*"—

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[748] **Exhibit C-214**, Industry Canada, *Wireless Telecommunications Market*, February 2014 [ATI Document], Slide 12.

[749] *See, e.g.*, **Exhibit CL-065**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, ¶¶ 450-52 (finding breach of FET standard when respondent's termination of a contract resulting in total loss of claimant's investment was out of proportion with the respondent's stated policy goals used to justify the termination); **Exhibit CL-084**, *Philip Morris Brands Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Born Concurring and Dissenting Opinion, 28 June 2016, ¶¶ 146-79 (explaining that the majority of the tribunal should have found a breach of FET because, while the goal of the respondent's measure, which precluded tobacco manufacturers from marketing more than one variety of cigarettes per brand family, was legitimate, the measure itself was both over and under broad, not tailored to achieve its stated goal, and enacted without significant research or critical thought on the part of the respondent).

[750] **Exhibit C-050**, AWS Auction Consultation, § 2.4.3.

which left the "*Competition Bureau to review spectrum license transfer impacts on competition*"[751]—might not achieve its new objective of a fourth carrier.[752]

343. The redundant consequence of Industry Canada's new policies reinforces the arbitrary and unreasonable nature of the Government's conduct. If there were any legitimate concerns relating to the impact on competition of a request to transfer spectrum, then the Competition Bureau's review of a merger or acquisition should have been sufficient. Instead, Industry Canada decided that it wanted a fourth carrier no matter what the cost, and without regard for whether such a policy would serve to increase competition.

344. The substantial cost, as discussed a Part V.E, was borne entirely by GTH. As a direct result of the fact that GTH had invested more than any other investor to establish Wind Mobile as the strongest New Entrant in the market, Industry Canada deliberately targeted Wind Mobile as the most viable fourth carrier to accomplish its objective. Thus, the cost of accomplishing the Government's goal fell squarely on GTH's shoulders. GTH should not have to pay for the arbitrary and unreasonable objectives of the Government. That Canada required this was a blatant breach of its obligation to treat GTH fairly and equitably.

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751 **Exhibit C-131**, Email from Rebecca Guillemette to Cindy-Lee Cook, et al., 10 December 2012, *attaching* Industry Canada, *Wireless Telecommunications Sector: Status Update and Implications*, 10 December 2012 [ATI Document], Slide 15.

752 **Exhibit C-131**, Email from Rebecca Guillemette to Cindy-Lee Cook, et al., 10 December 2012, *attaching* Industry Canada, *Wireless Telecommunications Sector: Status Update and Implications*, 10 December 2012 [ATI Document], Slide 15.

3. Canada Breached The Fair And Equitable Treatment Standard [redacted] On The Pretext Of An Arbitrary National Security Review

345. As discussed in Part V.C.1, GTH expected that Canada's approval of GTHCL's Voting Control Application would be "*relatively short*" and uncontroversial, given that it was merely trying to exercise a right contained in its corporate structure of which Canada was aware. Instead, Canada subjected GTH to an onerous and opaque eight-month review process during which Canada raised the spectre of national security concerns. Industry Canada's treatment [redacted] of the Application was unreasonable, arbitrary, non-transparent, and lacking in due process, amounting to an independent breach of Article II(2)(a) of the BIT. Moreover, upon disclosure from Canada, Canada's decision may prove to be pretextual.

346. From the outset of its investment, GTH was aware that Canada was contemplating the relaxation of the O&C Rules. This anticipated policy change was of particular importance to GTH given that GTH—which would go on to invest well over a billion in Wind Mobile—would possess the vast majority of the economic interest in Wind Mobile without being able to control its investment.[753] Thus, at the time of its participation in the 2008 AWS Auction, GTH had negotiated with Globalive a provision in its corporate agreements that permitted GTH to take voting control over its investment once the law changed.[754]

[753] *See supra* Part IV.A.

[754] *See supra* Part IV.B.

347. While it would take over three years from the issuance of Wind Mobile's licenses for the change in foreign ownership restrictions to take place, progress on this issue triggered in part by the inconsistent treatment of Wind Mobile during the contradictory and duplicative ownership and control reviews conducted by Industry Canada and the CRTC.[755] In March 2012, Minister Paradis finally announced that foreign investment restrictions would be lifted for telecommunications common carriers that hold less than a 10-percent share of the total Canadian telecommunications market.[756] In his announcement, Minister Paradis recognized this change was necessary to "*remove a barrier to investment for the companies that need it most*" in order to "*allow these companies to gain further access to capital and expertise, so that they can continue to grow and compete*."[757] In June 2012, the Telecommunications Act was revised to allow telecommunications common carriers with a less than 10% market revenues to operate in Canada even where they were not "*Canadian-owned and controlled*."[758]

348. Now that the long-anticipated relaxation of the O&C Rules had arrived, GTHCL duly applied to take voting control over its investment. At the time of GTHCL's Voting Control Application, GTH expected this procedure to move quickly and end with an approval of the Application.[759] After all, the Government was no doubt aware of GTHCL's right to

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755 *See supra* Part V.C.1.a.

756 *See supra* Part V.C.1.a.

757 **Exhibit C-123**, Industry Canada, *Speech: Speaking Points – The Honourable Christian Paradis, PC, MP Minister of Industry, Telecommunications Decisions*, 14 March 2012, https://www.canada.ca/en/news/archive/2012/03/telecommunications-decisions.html (last visited 24 September 2017).

758 *See* **Exhibit C-026**, An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures, Bill C-38, S.C. 2012, 29 June 2012, Section 2, p. 366.

759 *See supra* Part V.C.1.b.

gain voting control in the event of a change in the law as a result of both Industry Canada's and the CRTC's ownership and control reviews, and therefore that Wind Mobile would be able to take advantage of this change.[760]

349. Yet, contrary to reason, GTH was forced to endure eight months of obfuscation and uncertainty. [redacted]

350. Seeing that these statements lacked specificity and appeared broad enough to capture **any** foreign applicant who would seek to take advantage of the liberalized O&C Rules, GTH could not understand what about GTHCL's Voting Control Application caused Canada concern.[762]

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760 *See supra* Part V.A.

761 [redacted]

762 *See supra* Part V.C.1.b.

351. This ambiguity would remain for the duration of the review process: [redacted] Repeated and reasonable requests for information and specificity as to Canada's alleged national security concerns were unanswered or denied.[763]

352. [redacted] As the media

[redacted]

described at the time, "*Industry Minister Christian Paradis* [was] *reluctant to give his blessing until Ottawa has assurances about Wind's future owner*."[769]

353. [redacted]

354. [redacted]

[769] *See* **Exhibit C-179**, Rita Trichur, *Wind Mobile buyer keeps its 'options open,'* THE GLOBE & MAIL, 15 May 2013, https://beta.theglobeandmail.com/report-on-business/wind-mobile-buyer-keeps-its-options-open/article11939251/?ref=http://www.theglobeandmail.com& (last visited 27 September 2017).

[770] *See supra* Part V.C.1.b.

[771] *See supra* Part V.C.1.b.

[redacted]

[redacted]

355. [redacted] GTH made the only reasonable decision available: to withdraw its application.[776]

356. Canada's treatment of GTHCL's Voting Control Application was unreasonable and arbitrary and failed in any respect to resemble the basic principles of transparency that Canada now touts as one of its keystone principles of its public policy.[777] During the review—which should have been completed "*within the prescribed period*" and "*without delay*" according to the applicable regulations and lasting no more than a few weeks[778]—the Government failed at every stage to provide GTH with sufficient information regarding its concerns, which would have allowed GTH to clarify, respond to, or remediate any

[redacted]

776 *See supra* Part V.C.1.b.

777 *See* **Canada's Letter to the Tribunal on Procedural Issues**, 7 April 2017, pp. 2-8 (describing, among other things, that this Arbitration should be "*fully transparent and accessible to the public*" which "*is necessary to ensure the integrity and legitimacy of the arbitral proceeding*").

778 *See* **Exhibit C-009**, Investment Canada Act, §§ 25.2-25.4. The "*prescribed periods*" are set out in the National Security Review Regulations. *See* **Exhibit C-102**, National Security Review Regulations.

alleged issues.[779] This lack of due process is, in itself, a breach of the FET standard.[780] Canada cannot excuse itself from its obligation to provide a fair and transparent proceeding by perfunctorily declaring something a matter of "*national security*." Indeed, other tribunals have rejected respondents' attempts to defend breaches of the FET standard with conclusory, vague, or unsubstantiated invocations of "*national security*" concerns.[781]

357. In addition, Canada refused to offer GTH even the basic elements of due process. GTH was not at any point given a reasonable opportunity to respond during the review process by identifying what [redacted] sparked concern. Instead, the questions were broad and covered a number of areas equally applicable to any corporation with a foreign investor. Indeed, Canada used the pretext of the national security review process as a fishing expedition to gather information regarding GTH's future plans for Wind Mobile. [redacted]

[779] *See supra* Part V.C.1.b.

[780] **Exhibit CL-031**, *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶¶ 162, 165 (finding breach of FET when state agency revoked concession without explaining revocation in advance "*in clear and express terms*," which "*had a material adverse effect on* [the investor's] *ability to get to know clearly the real circumstances on which the maintenance or validity of the Permit depended*"); **Exhibit CL-066**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, ¶¶ 478, 487-88 (finding breach of FET when claimant was not adequately notified of the investigation against it nor provided an adequate opportunity to respond).

[781] **Exhibit CL-059**, *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. and Talsud S.A. v. The United Mexican States*, ICSID Cases Nos. ARB (AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010, ¶¶ 4-180, 7-70 (finding respondent's termination of claimant's concession was not, as the respondent claimed, based upon "*national security*" concerns, but rather respondent's "*invocation of 'imminent peril to national security' was a pretence and known to be factually false*").

[redacted] Likewise, the media speculated that the Government was primarily concerned to whom GTH was planning on selling Wind Mobile, and that it would reserve judgment on the Voting Control Application until this became clear.[783]

358. [redacted]

359. Tellingly, [redacted], Canada has changed its national security review procedures to be more "*open and transparent*."[786] The Minister of Industry announced in December 2016 new *Guidelines on the National Security Review of Investments*, which detail the factors to be taken into account when a

[redacted]

783 **Exhibit C-179**, Rita Trichur, *Wind Mobile buyer keeps its 'options open,'* THE GLOBE & MAIL, 15 May 2013, https://beta.theglobeandmail.com/report-on-business/wind-mobile-buyer-keeps-its-options-open/article11939251/?ref=http://www.theglobeandmail.com& (last visited 27 September 2017); **Exhibit C-198**, *Wind Mobile's backers shelve bid*, THE GLOBE & MAIL, 20 June 2013, https://beta.theglobeandmail.com/report-on-business/wind-mobile-future-in-question-as-foreign-investors-drop-bid/article12661883/?ref=http://www.theglobeandmail.com& (last visited 24 September 2017).

[redacted]

785 **Exhibit C-009**, Investment Canada Act, § 25.4(1).

786 **Exhibit C-246**, Industry Canada, *News Release: Government of Canada releases guidelines on the national security review of investments under the Investment Canada Act*, 19 December 2016, https://www.canada.ca/en/innovation-science-economic-development/news/2016/12/attracting-global-investments-develop-world-class-companies.html?wbdisable=true (last visited 25 September 2017).

transaction is subject to a national security review.[787] This tacit recognition of the inadequacy of its previous national security review regime, was, of course, too late for GTH and Wind Mobile.

360. [redacted], which lacked basic elements of due process, amounts to an independent breach of Canada's obligations to accord FET to GTH's investment.

4. Canada's Wrongful Measures Cumulatively Amount To A Breach Of The FET Standard

361. GTH has explained that Canada's acts must be viewed as a pattern of conduct that cumulatively breached GTH's rights under the BIT. In this vein, the independent breaches of Canada's obligation to accord FET as set forth above must also be viewed in light of the general pattern of conduct to which GTH's investment was subjected. *In toto*, as explained in this section, the overall treatment Canada accorded to Wind Mobile constitutes a cumulative breach of the FET standard.

362. It is well-accepted that a breach of FET may arise "*from a series of circumstances or a combination of measures*,"[788] even where (unlike here) each individual act in isolation might not by itself be considered a breach.[789] Canada's cumulative treatment of GTH's

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[787] **Exhibit C-247**, Investment Canada Act, *Guidelines on the National Security Review of Investments*, 19 December 2016.

[788] **Exhibit CL-075**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 566.

[789] **Exhibit CL-075**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 566 ("*the Tribunal agrees that even if a measure or conduct by the State, taken in isolation, does not rise to the level of a breach of the FET, such a breach may result from a series of circumstances or a combination of measures*"); **Exhibit CL-082**, *Crystallex International Corporation v Bolivarian Republic of*

investment from 2009 up until its sale in September 2014[790] was first and foremost in complete disregard of the conditions Canada promised GTH in order to induce its investment in Canada. While knowing that Canada could not guarantee its success, GTH invested in Canada with the legitimate expectation that Canada would engage in reasonable efforts to maintain a framework designed to alleviate barriers to entry and to facilitate competition in the wireless telecommunications market. Using this framework, Canada encouraged GTH to invest hundreds of millions of dollars to purchase spectrum and then many more to establish Wind Mobile and rollout its network. Yet, contrary to reason, Canada did exactly the opposite. Rather than alleviate barriers to entry, Canada in fact crippled Wind Mobile's ability to compete effectively. It then denied GTH the ability to take control of its investment—despite a change in the law allowing GTH to do so—thereby denying GTH the ability to direct the future of its investment. Finally, having put

Venezuela, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 545 ("[I]*t is the overall evaluation of the state's conduct as 'fair and equitable' that is the ultimate object of the Tribunal's examination . . . .* [T]*he Tribunal will endeavor to establish whether an overall pattern of conduct has emerged . . . and whether that overall pattern of conduct does indeed breach the standard.*"); **Exhibit CL-052**, *Société Générale v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, ¶ 91 ("*While normally acts will take place at a given point in time independently of their continuing effects, and they might at that point be wrongful or not, it is conceivable also that there might be situations in which each act considered in isolation will not result in a breach of a treaty obligation, but if considered as a part of a series of acts leading in the same direction they could result in a breach at the end of the process of aggregation, when the treaty obligation will have come into force*."); **Exhibit CL-074**, *OAO Tatneft v. Ukraine*, UNCITRAL, Award on the Merits, 29 July 2014, ¶¶ 330-32, 412-13 (observing that "*cumulative and composite acts and omissions are a well established principle governing liability under international law as evidenced by Article 15 of the International Law Commission Articles on State Responsibility*"); **Exhibit CL-085**, *Flemingo DutyFree Shop Private Limited v. The Republic of Poland*, UNCITRAL, Award, 12 August 2016, ¶ 536 ("*a succession of acts – whether or not individually significant – can build up to unfair and inequitable treatment until Article 3(2) is breached*"); *See also* **Exhibit CL-064**, *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012, ¶ 275.

[790] It is well accepted that in the context of a cumulative breach of FET, the critical date is the date on which the series of acts culminates into a breach. *See* **Exhibit CL-044**, *United Parcel Service of America Inc v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, 24 May 2007, ¶¶ 24-28; **Exhibit CL-028**, INTERNATIONAL LAW COMMISSION, Responsibility of States for Internationally Wrongful Acts (2001). In this case, the earliest possible date of relevance is June 2013, [redacted] In this case, the earliest possible date of relevance is June 2013, [redacted]

Wind Mobile in a corner such that GTH was forced to contemplate exercising a key exit strategy (the sale of Wind Mobile to an Incumbent), Canada deliberately blocked GTH from exercising that right. Canada's acts, considered in their entirety, amount to a cumulative breach of Article II(2)(a) of the BIT, both by: (*i*) amounting to a complete frustration of GTH's legitimate expectation that it would be subject to a framework designed to alleviate barriers to entry and to facilitate competition in the wireless telecommunications market; and (*ii*) by subjecting GTH to a "*series of circumstances*," which, *in toto*, can only be described as unreasonable, arbitrary, non-transparent, and inconsistent.

363. First, from 2009 through 2012, Canada subjected GTH to an unreasonable, redundant, and inconsistent O&C review process by the CRTC.[791] Not only was the new four-tier review procedure expressly created to target Wind Mobile alone, but it was created **after** the Government had already concluded that GTH's investment satisfied the O&C Rules. As Mr. Campbell explained to Minister Clement, the Minister of Industry at this time, the delays caused by Canada's inconsistent rulings not only impeded Wind Mobile's success, but also the success of the policies the Government had put in place, ostensibly with the aim of enabling market entry and increasing competition.[792]

364. Canada was well aware of the redundancy in its processes and the potential negative impact on investors resulting from it. Yet, Canada did nothing to prevent it:

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[791] *See supra* Part V.A.

[792] *See* **Exhibit C-106**, Email from Ken Campbell to Khaled Bichara, et al., 31 October 2009, *attaching* Letter from Ken Campbell to the Honourable Tony Clement, 31 October 2009.

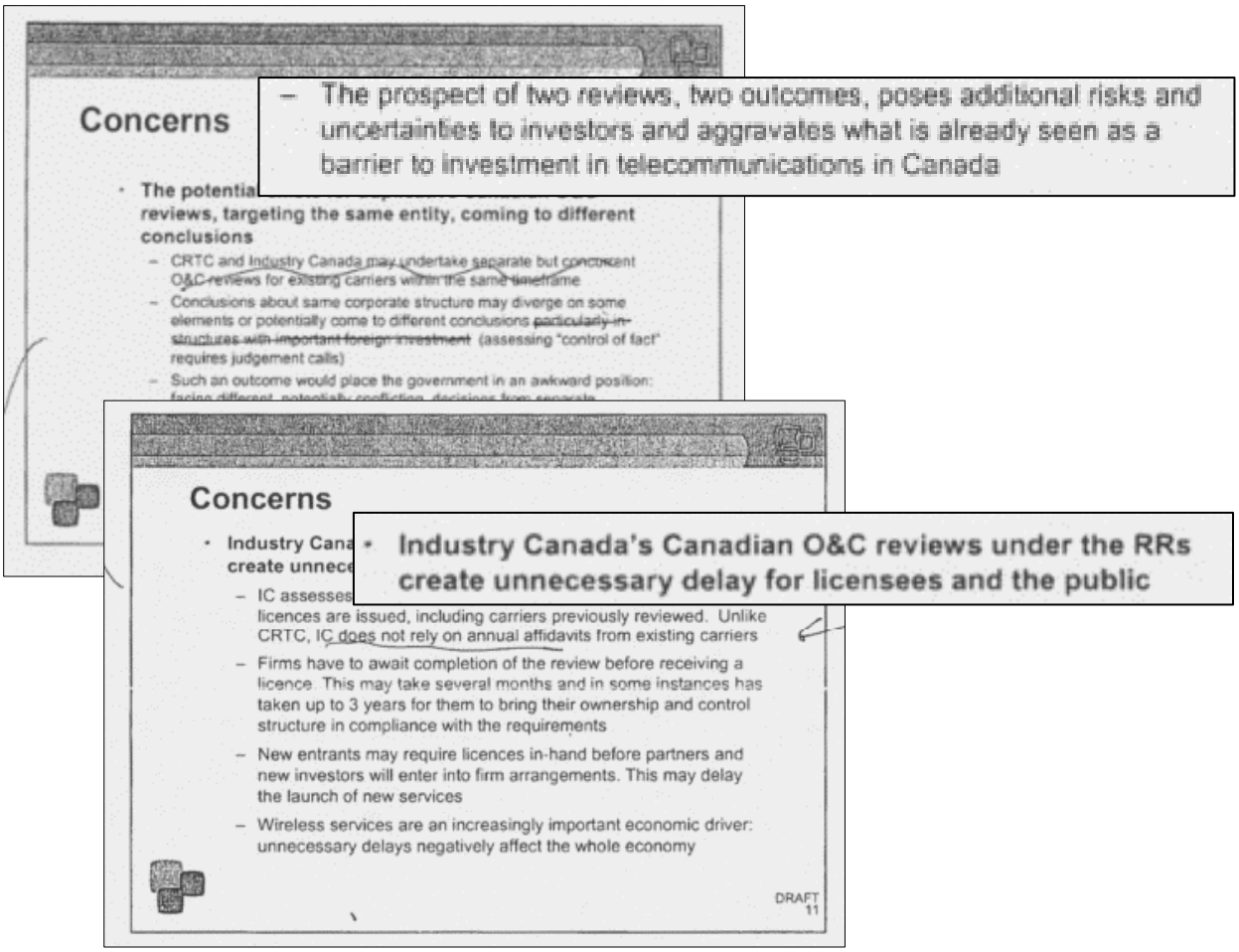

Figure 6: Slide 10-11 of an internal Industry Canada presentation. **Exhibit C-099**, Industry Canada, *Canadian Ownership and Control – Globalive and the CRTC Review*, June 2009 [ATI Document], Slides 10-11.

365. Second, for the duration of GTH's investment, Canada failed to uphold the conditions it acknowledged were necessary to address market entry barriers and, thereby, offer a New Entrant like Wind Mobile any chance of success. Canada touted at the outset of the 2008 AWS Auction the steps it would undertake to ensure fair roaming agreements and tower and site sharing arrangements.[793] In emphasizing these conditions in its 2008 AWS Auction

[793] *See supra* Part III.B.6.

framework, Industry Canada sought to induce investors to participate in the Auction. As Mr. Connolly explains:

> *We understood from historic experience, financial and economic analysis, and comments received during the consultation process, that there were several barriers to market entry by new operators. It was clear to us that, without intervention, these barriers would both deter prospective investors from participating in the auction, as well as hinder their ability to compete effectively if successful in bidding for spectrum licenses. On this basis, we introduced into the AWS Auction certain conditions to alleviate these barriers. Namely, we decided that we would set-aside designated spectrum for New Entrants only (to address the Incumbents' greater bidding power relative to New Entrants), and we incorporated mandatory roaming and mandatory site sharing conditions (to address the significant disadvantage of New Entrants in developing the necessary infrastructure and deploying new services). We were aware that establishing a new carrier would require significant investment of capital, and understood that these conditions were necessary to facilitate such an investment in the AWS Auction and the subsequent investment required to support a New Entrant thereafter.*[794]

366. Accordingly, GTH relied on the reasonable enforcement of this regime by Canada in making its decision to invest, exactly as Industry Canada anticipated a new investor would.[795] However, when it became clear that the Incumbents would not negotiate roaming and tower sharing agreements in good faith (as required by the framework) and despite repeated requests from New Entrants like Wind Mobile to remedy what it considered to be a clear breach of license, Canada turned a blind eye.[796] As explained in detail in Part V.B, Canada allowed Rogers to take advantage of loopholes and ambiguity in the policy documents to negotiate prohibitive roaming agreements, and other Incumbents to obfuscate

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[794] **CWS-Connolly**, ¶ 12.

[795] *See generally* Part IV.

[796] *See supra* Part V.B.

and delay tower sharing negotiations. The Incumbents' actions impeded Wind Mobile and the other New Entrants who needed to launch quickly to compete. Canada would, as it turns out, refuse to act until March 2013—an implicit recognition of its previous failures to act that was, for obvious reasons, too little too late.[797]

367. Having been subjected to an unreasonable, redundant, and ultimately inconsistent ownership and control review by the CRTC and required to battle at every stage with Incumbents for fair tower and site-sharing arrangements contrary to the basic precepts contained in the 2008 AWS Auction Framework, GTH began contemplating alternative strategic options for the future of the Wind Mobile business, including a potential sale to an Incumbent.[798]

368. In one positive development, and as described in Part V.C.1, Canada finally revised its O&C Rules in a way that would allow GTH (after several years of anticipation) to take control over its substantial investment and the strategic future of Wind Mobile. GTHCL submitted the Voting Control Application to Industry Canada understanding that the approval process would be straightforward. In particular, Industry Canada had been aware of GTH's shareholding structure and the provision in its corporate documents that allowed GTH to take voting control if the laws were to change.[799] Instead, the review process devolved into an eight month proceeding during which Canada hid behind a curtain of alleged "*national security*" concerns, while refusing to identify the source and cause of

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[797] *See supra* Part V.B.2.

[798] *See supra* Part V.C.2.

[799] *See supra* Part V.A.1.

these concerns and what could be done to remedy them. Instead, Canada used the guise of a national security review to interrogate GTH and VimpelCom about their commercial intentions for the Wind Mobile business.[800]

369. Simultaneously, and as discussed in Part V.C.2, by early 2013, Canada (and the public) was aware that New Entrants were contemplating exiting the market and consolidating with the Incumbents due to Canada's failure to keep its commitments in the first place. This news sparked Minister Paradis's initiation of a consultation procedure on a new Transfer Framework which would effectively block the sale of New Entrants to an Incumbent and a declaration that Canada would use any tool available to ensure a fourth player. Indeed, Canada showed great interest in the potential sale of GTH to an Incumbent: a number of meetings with Canada ostensibly focused on the national security review process also inexplicably required VimpelCom to discuss its plans for the future of Wind Mobile.[801]

370. Then, within a two week period in June 2013: [redacted] and (*ii*) Industry Canada released its 2013 Transfer Framework providing the Minister with unfettered discretion to block a sale of the New Entrants to an Incumbent.[803] In other words, [redacted] while at the same blocking GTH's most promising and valuable options to sell the business.

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800 *See supra* Part V.C.1.b.

801 *See supra* Part V.C.2.

802 *See supra* Part V.C.1.b.

803 *See supra* Part V.C.2.d.

371. At this point, Canada had cornered GTH and left it with only two options: (*i*) convince its shareholders to continue contributing substantial sums each month in an investment that Canada was not going to allow GTH to control due to undisclosed national security concerns; or (*ii*) exit the market and seek to recover whatever value it could through a sale to a non-Incumbent. Given Canada's treatment of GTH and Wind Mobile up to this point, GTH made the only rational decision in the circumstances and chose to exit.[804]

372. Canada's acts, considered in their entirety, amount to a cumulative breach of Article II(2)(a) of the BIT. Throughout the lifetime of GTH's investment, Canada engaged in an "*overall pattern of conduct*,"[805] which, *in toto*, created an unstable and unpredictable framework vastly deviating from that which was in place at the time of its investment. Namely, through the framework that existed at the time of GTH's investment, Canada made clear that its policies would aim to alleviate barriers to market entry and promote a competitive environment. While GTH understands that Canada did not guarantee a New Entrant's success, GTH reasonably and legitimately expected Canada to stand by these basic commitments. Instead, GTH learned that the commitments made by Canada at the outset of its investment were meaningless. Once the investment was made, Canada not only abandoned its promises, but its actions and inactions in fact hindered the ability of Wind Mobile to compete and succeed. When it became clear that GTH had no choice but

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804 *See supra* Part V.D.

805 **Exhibit CL-082**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 623 ("*In conclusion, Venezuela has violated the 'fair and equitable treatment' clause contained in Article II(2) of the Treaty. The Respondent frustrated Crystallex's legitimate expectations arising out of the specific promise contained in the 16 May 2007, engaged in arbitrary conduct in denying the Permit and rescinding the MOC, and committed several acts lacking transparency and consistency, as described above. By way of its overall conduct vis-à-vis Crystallex, the Respondent thus violated the FET standard contained in Article II(2) of the Treaty and thereby caused all of the investments made by Crystallex to become worthless, which will be further established below*.").

to exit Canada, Canada prohibited GTH from selling its investment for its genuine value and in accordance with the terms of the original framework it had put in place.

373. As recognized by the tribunal in *PSEG v. Turkey*:

> *Stability cannot exist in a situation where the law kept changing continuously and endlessly, as did its interpretation and implementation . . . the issue is that the longer term outlook must not be altered in such a way that will end up being no outlook at all. In this case, it was not only the law that kept changing but notably the attitudes and policies of the administration.*[806]

374. GTH's situation was no different. Wind Mobile had become the viable fourth carrier Canada sought, **in spite of** the hurdles Canada put in its way and at a cost of well over a billion dollars to GTH. By failing to keep its commitments, Canada was able to reap the benefits. First, it had collected the financial benefit of well over C$ 440 million in spectrum costs from Wind Mobile.[807] Second, Canada gained the political benefits of advertising its success in improving wireless offerings and increasing competition in the market.[808] However, once the press concluded that Canada's efforts were in jeopardy, the Government blocked GTH's ability to exit through a sale to an Incumbent and announced that it would

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806 **Exhibit CL-042**, *PSEG Global Inc. and Konya Ilgın Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, ¶ 254. *See also* **Exhibit CL-041**, *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶¶ 124-25 (observing multiple tribunals have concluded that "*the stability of the legal and business framework in the State party is an essential element in the standard of what is fair and equitable treatment*").

807 In total, the 2008 AWS Auction "*generated almost $4.3 billion in revenues for the Government of Canada.*" **Exhibit C-081**, Industry Canada, *News Release: 15 Companies Bid Almost $4.3 Billion for Licences for New Wireless Services*, 21 July 2008, https://www.canada.ca/en/news/archive/2008/07/15-companies-bid-almost-4-3-billion-licences-new-wireless-services.html (last visited 24 September 2017).

808 *See, e.g.*, **Exhibit C-193**, Industry Canada, *Speech: Speaking Points – The Honourable Christian Paradis, PC, MP, Minister of Industry, Telecommunications Announcement*, 4 June 2013, https://www.canada.ca/en/news/archive/2013/06/telecommunications-announcement.html (last visited 24 September 2017).(Minister Paradis describes that Industry Canada's "*efforts are paying off*" that "*we will not allow this progress to be lost or undermined*.").

take any steps necessary to maintain a fourth carrier in the market. In sum, the attitudes and policies of the Government changed to suit its purpose, and GTH was forced to bear this cost.

375. The above amounts to a blatant cumulative breach of Canada's obligation to accord FET protection to GTH's investment by completely frustrating GTH's legitimate expectation that it would be subject to a framework designed to alleviate barriers to entry and to facilitate competition in the wireless telecommunications market. Moreover, and also amounting to breach of FET, Canada's conduct for the duration of GTH's investment was unreasonable, arbitrary, non-transparent, and inconsistent.

B. GTH's Investment Has Not Been Accorded Full Protection And Security

376. Article II(2)(b) of the BIT requires Canada to "*accord investments or returns of investors of the other Contracting Party . . . full protection and security*."[809] The full protection and security ("**FPS**") standard represents the host State's guarantee to provide a stable and secure investment environment. To do so, the host State is required to exercise: (*i*) "*vigilance*" which requires the host State to "*take all measures necessary to ensure the full enjoyment and protection and security of* [the investor's] *investment*";[810] and (*ii*) "*due diligence*" which requires the host State to take "*reasonable, precautionary and preventive action*" against harm to the protected investment.[811] While the standard is not one of strict or absolute liability, the host State must take all reasonable measures to protect the investor against harm from both the actions of the host State and its representatives and the actions of third parties.[812]

377. As explained by Professor Christoph Schreuer, the content of the FET standard and the FPS standard differ; on the one hand, "[t]*he FET standard consists mainly of an obligation on the host State's part to desist from behaviour that is unfair and inequitable*."[813] On the other hand:

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809 **Exhibit CL-001**, BIT, Art. II(2)(b).

810 **Exhibit CL-026**, *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, ¶ 6.05.

811 **Exhibit CL-049**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 725; **Exhibit CL-025**, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, ¶ 85(b) (finding breach of FPS and violation of the due diligence obligation through "*failure to resort to . . . precautionary measures*" and "*inaction and omission*").

812 **Exhibit CL-049**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 730.

813 **Exhibit CL-056**, Christoph Schreuer, *Full Protection and Security*, JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT (2010), p. 14.

> [B]*y assuming the obligation of full protection and security the host State promises to provide a factual and legal framework that grants security and to take the measures necessary to protect the investment against adverse action by private persons as well as State organs. In particular, this requires the creation of legal remedies against adverse action affecting the investment and the creation of mechanisms for the effective vindication of investors' rights.*[814]

378. FPS extends beyond the obligation to ensure the *physical* security of an investment, and includes the guarantee of commercial and legal security.[815] Indeed, the definition of "*investment*" in the BIT includes intangible assets, which are equally protected under the full protection and security provision.[816] Those assets are not prone to physical harm, rather it is the commercial and legal security of those investments that is of concern. Commercial and legal security contemplates a positive obligation on the State to create and maintain a commercial and legal framework that ensures the security of investments and protects investments from the adverse actions of third parties or State organs. The failure to exercise the necessary due diligence in this regard, especially when the State has full knowledge of

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[814] **Exhibit CL-056**, Christoph Schreuer, *Full Protection and Security*, JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT (2010), p. 14.

[815] *See* **Exhibit CL-049**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶¶ 728-30 ("*It would in the Arbitral Tribunal's view be unduly artificial to confine the notion of '**full security**' only to one aspect of security, particularly in light of the use of this term in a BIT, directed at the protection of commercial and financial investments.*") (emphasis in original). *See also* **Exhibit CL-039**, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 408 (observing that FPS "*is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view*"). As the tribunal in *National Grid v. Argentina* stated, there is "*no rationale for limiting the application of a substantive protection of the Treaty to a category of assets—physical assets—when it was not restricted in that fashion by the Contracting Parties*." **Exhibit CL-053**, *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, ¶ 187. *See also* **Exhibit CL-045**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶¶ 7.4.15-7.4.17.

[816] *See* **Exhibit CL-043**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶ 303 ("*It is difficult to understand how the physical security of an intangible asset would be achieved*.").

the adverse actions adversely impacting foreign investments, is a clear breach of the FPS standard.

379. That is exactly the circumstance in the case at hand. In complete failure of its obligations to accord FPS protection to GTH's investment, Canada's cumulative action (and inaction) towards GTH's investment threatened the commercial and legal security of GTH's investment. First, Canada failed to protect GTH's investment from the Incumbents' anti-competitive behavior. Specifically, Wind Mobile regularly brought to the Government's attention the Incumbents' refusal to offer tower and site sharing on commercially reasonable terms and refusal to negotiate commercially reasonable roaming rates.[817] Yet, the Government failed to act promptly to address these actions by the Incumbents, and instead took four years before remedying the untenable circumstances faced by Wind Mobile.[818] By contrast, the Government was able to initiate a consultation and adopt its new Transfer Framework all within a three-month period.[819] When it suited its purpose, Canada was able to act promptly.

380. Second, knowing that GTH had a right to take advantage of the relaxation in its O&C Rules, Canada subjected GTH to a lengthy and non-transparent review process in which GTH had no recourse to respond to or contest what it understood to be a meritless and arbitrary refusal of the Voting Control Application.[820] In this regard, the Government once

[817] *See supra* Part V.B.

[818] *See supra* Part V.B.2.

[819] *See supra* Parts V.C.2.b to V.C.2.d.

[820] *See supra* Part V.C.1.

again failed to grant GTH's investment the legal protection and security to which it was entitled.

381. Third, as described above, the Government failed to ensure the security of GTH's investment by fundamentally changing the legal framework governing its investment, including by refusing to allow GTH to transfer its spectrum after the expiration of the Five-Year Rollout Period.[821] Similarly, in *CME v. Czech Republic*, the tribunal noted that "[t]*he host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued.*"[822] Here, the Government adopted its unlawful measure knowing that it would devalue GTH's investment.[823] Like in *CME*, the removal of the security and legal rights accorded to GTH's investment are a breach of Canada's FPS obligation.[824]

By failing to protect and secure GTH's investment, Canada has breached its obligations under Article II(2)(b) of the BIT.

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821 *See supra* Part V.C.2.

822 **Exhibit CL-030**, *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶ 613.

823 *See* **Exhibit C-131**, Email from Rebecca Guillemette to Cindy-Lee Cook, et al., 10 December 2012, *attaching* Industry Canada, *Wireless Telecommunications Sector: Status Update and Implications*, 10 December 2012 [ATI Document], Slides 16-17.

824 **Exhibit CL-030**, *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶ 613 (the tribunal finding a breach of the full protection and security standard where "[t]*he Media Council's actions in 1996 and its actions and inactions in 1999 were targeted to remove the security and legal protection of the Claimant's investment in the Czech Republic*"). *See also* **Exhibit CL-053**, *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, ¶ 189 (finding a breach of the full protection and security standard where "*the changes introduced in the Regulatory Framework by the Measures . . . effectively dismantled it*").

C. Canada Has Breached The Guarantee Of Unrestricted Transfer of Investments

382. Canada has breached its obligation to guarantee the unrestricted transfer of investments by blocking GTH's ability to transfer Wind Mobile's licenses to an Incumbent. Article IX(1) of the BIT provides in relevant part:

> *Each Contracting Party shall guarantee to an investor of the other Contracting Party* ***the unrestricted transfer of investments*** *and returns.* ***Without limiting the generality of the foregoing****, each Contracting Party shall also guarantee to the investor the unrestricted transfer of: . . .*[825]

383. As expressly recognized in the provision, this guarantee of unrestricted transfer is broad and extends to any "*investment*" or "*return*" as defined in the BIT.

384. The importance of such a guarantee is clear. First, this "*free transfer principle*" is aimed at prohibiting measures that would restrict the transfer or "*effective*[] *imprisonment*" of an investor's protected investment.[826] As the tribunal in *Continental Casualty Company v. Argentine Republic* explained:

> *Protected transfers are those essential for, or typical to the making, controlling, maintenance, disposition of investments, especially in the form of companies; or in the form of debt, service and investment contracts, including the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds,*

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825 **Exhibit CL-001**, BIT, Art. IX(1) (emphasis added).

826 **Exhibit CL-049**, *Biwater Gauff (Tanzania) Ltd., v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 735. *See also* **Exhibit CL-067**, *Achmea B.V. v. The Slovak Republic*, PCA Case No. 2008-13, Final Award, 7 December 2012, ¶ 286 (finding that Slovakia's "*ban on profits*," which prohibited the distribution of profits to investors and was declared unconstitutional by the Constitutional Court of Slovakia, was a breach of Slovakia's obligations under the relevant BIT's free transfer provision which guaranteed the free transfer of funds (and was therefore more narrow than that contained in this BIT)); **Exhibit CL-068**, *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award, 1 November 2013, ¶¶ 423-27 (observing that a "*tariff in exchange for investment*" scheme which required investors to reinvest all operating cash flow could be a breach of the ECT's free transfer provision, although such breach was already absorbed in its finding that FET had been breached as a result of the same scheme).

> *including intellectual and industrial property rights; and the borrowing of funds, to name the kind of investments and associated activities mentioned in Art. I of the BIT more relevant to this issue.*[827]

385. Professor Andrew Newcombe and Lluís Paradell observe in their treatise on investment treaties that broad language of the type contained in Article XI(1) protects the sale or disposition of investments generally:

> [S]*ome IIA provisions appear to apply more generally to restrictions on the investment itself. For example, Article VII, Canada-Venezuela* [BIT] *(1996), guarantees to investors 'the unrestricted transfer of investments.'* ***Domestic restrictions on the sale or other disposition of the investment that prevent the investor from liquidating its investment would appear to be covered by this type of provision, and not simply the transfer of funds after liquidation***.[828]

386. GTH's protected "*investment*" in Canada is the bundle of rights associated with its indirect shareholding and loans to Wind Mobile.[829] In accordance with Article IX(1), Canada is obligated to allow GTH to freely transfer these investment without restriction. In short, when Canada blocked GTH's ability to transfer its investment to an Incumbent after the expiration of the Five-Year Rollout Period,[830] Canada clearly breached Article IX(1) of the BIT, causing GTH substantial and incontrovertible damage. It is hard to imagine a more obvious breach of this provision of the BIT. Indeed, the case law simply does not contain a precedent for such a flagrant breach of the free transfer provision.

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[827] **Exhibit CL-051**, *Continental Casualty Company v. Argentine Republic*, ICSID Case No ARB/03/9, Award, ¶ 240.

[828] **Exhibit CL-054**, *Chapter 8 – Transfer Rights, Performance Requirements and Transparency in* Andrew Newcombe & Lluís Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (2009) pp. 399-436, § 8.8 (emphasis added).

[829] *See supra* Part IV.B.

[830] *See supra* Part V.C.2 .

D. GTH's Investment Has Not Been Accorded National Treatment Protection

387. Canada breached its obligation to accord national treatment protection when it applied a newly-created, targeted and opaque national security review procedure to [redacted]

388. A national treatment provision represents "*an application of the general prohibition of discrimination based on nationality, including both* de jure *and* de facto *discrimination*."[831] Canada's obligation to accord GTH's investment national treatment protection is contained in two provisions of the BIT. First, under the heading "*Establishment, Acquisition and Protection of Investments*," Article II(3) of the BIT provides:

> *Each Contracting Party shall permit establishment of a new business enterprise or acquisition of an existing business enterprise or a share of such enterprise by investors or prospective investors of the other Contracting Party on a basis no less favourable than that which, in like circumstances, it permits such acquisition or establishment by: (a) its own investors or prospective investors . . . .*[832]

389. Article IV of the BIT, referring to "*National Treatment after Establishment and Exceptions to National Treatment*" further states, in relevant part:

> *Each Contracting Party shall grant to investments or returns of investors of the other Contracting Party treatment no less favourable than that which, in like circumstances, it grants to investments or returns of its own investors*

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831 **Exhibit CL-046**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007, ¶ 193 (noting further with respect to *de jure* and *de facto* discrimination that "[t]*he former refers to measures that on their face treat entities differently, whereas the latter includes measures which are neutral on their face but which result in differential treatment*"). *See also* **Exhibit CL-048**, *Corn Products International, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008, ¶ 109 ("*The Tribunal notes at the outset that Article 1102 embodies a principle of fundamental importance, both in international trade law and the international law of investment, that of non-discrimination.*").

832 **Exhibit CL-001**, BIT, Art. II(3).

> *with respect to the expansion, management, conduct, operation, and sale or disposition of investments.*[833]

390. This assessment of whether investors are "*in like circumstances*" is fact-specific. Typically, investors are considered to be "*in like circumstances*" if they are competing entities in the same business or economic sector.[834] Whether the protected investor received treatment "*less favourable*" than that of a national investor depends on: (*i*) whether the measure on its face appears to favor its nationals over non-nationals; or (*ii*) whether the practical effect of the measure creates a disproportionate benefit for nationals over non-nationals.[835] Discriminatory intent may be relevant to finding a breach of national treatment obligations, but is not a necessary precondition.[836]

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[833] **Exhibit CL-001**, BIT, Art. IV. For the avoidance of doubt, the exceptions to national treatment protection contained in Article IV(2)(d) and the related Annex A do not apply. The wireless telecommunications sector does not fall under any of the "*sectors or matters*" contained in Annex A. It is neither an enumerated "*social services*" sector nor does it fall under the category of "*services in any other sector*." Of particular note, Canada has separately identified telecommunications as an exception in other bilateral investment treaties where it has sought such an exception. *See, e.g.*, **Exhibit CL-073**, Agreement Between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments (which identifies in Annex II(8): "*telecommunications services, where the measure does not conform with the obligations imposed by Article 5 (National Treatment) or Article 9 (Senior Management, Boards of Directors and Entry of Personnel) of this Agreement by limiting foreign investment in facilities-based telecommunications service suppliers, requiring that such service suppliers be controlled in fact by a Canadian, requiring that at least 80 percent of the members of the board of directors of such suppliers be Canadian, and imposing cumulative foreign investment level restrictions*"); **Exhibit CL-069**, Agreement Between the Government of Canada and the Government of the United Republic of Tanzania for the Promotion and Reciprocal Protection of Investments, 9 December 2013, Annex II; **Exhibit CL-078**, Agreement Between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Annex II.

[834] **Exhibit CL-027**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶ 250; **Exhibit CL-029**, *Pope & Talbot Inc v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, ¶ 78 ("*the Tribunal believes that, as a first step, the treatment accorded a foreign owned investment protected by Article 1102(2) should be compared with that accorded domestic investments in the same business or economic sector.*"); **Exhibit CL-046**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007, ¶ 198 (citing *S.D. Myers* and *Pope & Talbot* affirmatively).

[835] **Exhibit CL-027**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶ 252.

[836] **Exhibit CL-027**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶ 254; **Exhibit CL-077**, *William Ralph Clayton, Bilcon of Delaware, Inc., et al. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, ¶ 719 ("*It should be noted that the UPS*

391. Once the elements above have been shown, the burden is on the State to demonstrate that an apparent discriminatory treatment is justified by a rational basis.[837] In particular, States are prohibited from pursuing a legitimate policy goal in a manner that results in disparate treatment where there are alternatives that would have avoided that treatment.[838] As explained by the tribunal in *Pope & Talbot v. Canada* in relation to the national treatment provision contained in NAFTA:

> *Differences in treatment will presumptively violate Article 1102(2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or de facto, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA.*[839]

392. Canada breached its obligation to provide national treatment protection to GTH when, in response to GTHCL's Voting Control Application, it initiated and conducted an opaque and lengthy review on the basis of alleged national security concerns, pursuant to a review

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test does not require a demonstration of discriminatory intent."); **Exhibit CL-034**, *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004, ¶ 177; **Exhibit CL-046**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007, ¶ 209.

837 **Exhibit CL-077**, *William Ralph Clayton, Bilcon of Delaware, Inc., et al. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, ¶¶ 722-24. *See also* **Exhibit CL-062**, Rudolf Dolzer & Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2d ed 2012), p. 202; **Exhibit CL-027**, *S.D. Myer,s Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶ 250 ("*The assessment of 'like circumstances' must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest*."); **Exhibit CL-029**, *Pope & Talbot Inc v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, ¶ 781; **Exhibit CL-048**, *Corn Products International, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008, ¶ 142 (observing that "[d]*iscrimination does not cease to be discrimination, nor to attract the international liability stemming therefrom, because it is undertaken to achieve a laudable goal or because the achievement of that goal can be described as necessary*.").

838 **Exhibit CL-027**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶ 255.

839 **Exhibit CL-029**, *Pope & Talbot Inc v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, ¶ 78 (citations omitted).

procedure applicable only to foreign investors.[840] [redacted] By definition, the national security review brought pursuant to the Investment Canada Act applies only to foreign investors.[842] This is a case of *de jure* discrimination: such a review was not, and could not, be imposed on any similarly situated Canadian investor in the wireless telecommunications market.

393. Canada therefore has the burden of demonstrating that the national security review [redacted] had a reasonable nexus to a rational government policy. Although the stated objective of this review process—to protect national security—appears legitimate on its face, Canada must furnish evidence to show that its application of this mechanism to foreign investors and not domestic investors, and to GTH in particular, was reasonable or rational.

394. Importantly, for the duration of the events, Canada neither gave GTH information as to the source of its concerns, nor what, if anything, could be done to address them.[843] [redacted]

840 *See supra* Part V.C.1.b.

841 *See supra* Part V.C.1.b.

842 *See* **Exhibit C-009**, Investment Canada Act, § 25.1 ("*This Part applies in respect of an investment, implemented or proposed, by a non-Canadian . . .*").

843 *See supra* Part V.C.1.b.

844 *See supra* Part V.C.1.b.

[redacted]

VIII. GTH IS ENTITLED TO FULL REPARATION

395. The Tribunal is empowered by Article XIII(9) of the BIT to "*award, separately or in combination . . . monetary damages and any applicable interest*."[845] The BIT does not provide a standard for compensation in the event of a breach of Articles II and IX. Consequently, the Tribunal must turn to basic principles governing reparations under customary international law. In the seminal *Case Concerning the Factory at Chorzów*, the Permanent Court of International Justice articulated the basic purpose and principle of reparations as follows:

> *The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that* ***reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed****. Restitution in kind, or, if this is not possible,* ***payment of a sum corresponding to the value which a restitution in kind would bear****; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.*[846]

396. The authoritative standard set out in *Chorzów*[847] and has since been codified in the International Law Commission's Articles on Responsibility of States for Internationally

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[845] **Exhibit CL-001**, BIT, Art. XIII(9).

[846] **Exhibit CL-020**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Judgment, 13 September 1928, 1928 P.C.I.J. (Ser. A) No. 17, p. 47 (emphases added).

[847] *See* **Exhibit CL-082**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 847-48 (describing *Chorzów* as "[a]*n authoritative description of the principle of full reparation*"); **Exhibit CL-040**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, ¶¶ 484-95 (review decisions of international courts and tribunals to find that the principle set forth in *Chorzów* is the governing standard); **Exhibit CL-045**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶¶ 8.2.4-8.2.5 (quoting *Chorzów* and

Wrongful Acts ("**Articles on State Responsibility**").[848] Specifically, Article 31(1) of the Articles on State Responsibility provides that "[t]*he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act*."[849] Article 31(2) defines "*injury*" as "*any damage, whether material or moral, caused by the internationally wrongful act of a State*."[850]

397. The Articles on State Responsibility identify three forms of reparations: restitution, compensation, and satisfaction.[851] Restitution is the primary remedy, which requires the

observing that "[t]*here can be no doubt about the vitality of this statement of the damages standard under customary international law, which has been affirmed and applied by numerous international tribunals as well as the PCIJ's successor, the International Court of Justice*"); **Exhibit CL-035**, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, (2004) I.C.J. REPORTS 136, 198, ¶ 152; **Exhibit CL-023**, *Texaco Overseas Petroleum Company (TOPCO) and California Asiatic Oil Company (CALASIATIC) v. The Government of the Libyan Arab Republic*, Award on the Merits, 19 January 1977, 17 I.L.M. 1, 32, ¶ 97; **Exhibit CL-083**, *Murphy Exploration & Production Company – International v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶¶ 424-25; **Exhibit CL-036**, *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 400; **Exhibit CL-024**, *Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran et al.*, Case No. 56, Award No. 310-56-3, 14 July 1987, 15 IRAN – U.S. C.T.R. 189, 246, ¶ 191; **Exhibit CL-058**, *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, ¶ 129.

[848] *See* **Exhibit CL-028**, INTERNATIONAL LAW COMMISSION, Responsibility of States for Internationally Wrongful Acts (2001), Art. 31. *See also* **Exhibit CL-079**, *Bernhard Friedrich Arnd Rüdiger von Pezold et al. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶¶ 682-84; **Exhibit CL-080**, *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, ¶¶ 327-28; **Exhibit CL-043**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶¶ 350-52; **Exhibit CL-075**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶¶ 678-79; **Exhibit CL-030**, *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶¶ 617-18; **Exhibit CL-083**, *Murphy Exploration & Production Company – International v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶¶ 424-25.

[849] **Exhibit CL-028**, INTERNATIONAL LAW COMMISSION, Responsibility of States for Internationally Wrongful Acts (2001), Art. 31(1).

[850] **Exhibit CL-028**, INTERNATIONAL LAW COMMISSION, Responsibility of States for Internationally Wrongful Acts (2001), Art. 31(2).

[851] **Exhibit CL-028**, INTERNATIONAL LAW COMMISSION, Responsibility of States for Internationally Wrongful Acts (2001), Art. 34.

State "*to re-establish the situation which existed before the wrongful act was committed*."[852] However, where restitution is materially impossible, Article 36 explains that "[t]*he State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution*."[853] Compensation must "*cover any financially assessable damage including loss of profits insofar as it is established*."[854] In *Vivendi*, the tribunal described:

> [I]*t is generally accepted today that, regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient* ***to compensate the affected party fully and to eliminate the consequences of the state's action***.[855]

398. In other words, the "*full reparation*" standard under customary international law requires that GTH be placed in the same economic position it would have been in had Canada's wrongful acts not occurred—*i.e.*, the "*but-for*" scenario.[856] The Tribunal's task in valuing the damage caused to an investment as a result of Canada's breaches is to consider the

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[852] **Exhibit CL-028**, INTERNATIONAL LAW COMMISSION, Responsibility of States for Internationally Wrongful Acts (2001), Art. 35.

[853] **Exhibit CL-028**, INTERNATIONAL LAW COMMISSION, Responsibility of States for Internationally Wrongful Acts (2001), Art. 36(1).

[854] **Exhibit CL-028**, INTERNATIONAL LAW COMMISSION, Responsibility of States for Internationally Wrongful Acts (2001), Art. 36(2).

[855] **Exhibit CL-045**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶ 8.2.7 (emphasis added).

[856] *See* **Exhibit CL-088**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, ¶ 358 ("*In the Tribunal's view, when quantifying the value of the expropriated assets, the Tribunal must proceed on the basis that Burlington is entitled to exercise all of the contractual rights it would have had but for the expropriation, and that Ecuador would have complied with its contractual obligations going forward. In other words, when building the counterfactual scenario in which the expropriation has not occurred, the Tribunal must assume that Burlington holds the rights that made up the expropriated assets and that those rights are respected*.").

value of that investment in a *but-for* world, "*wip*[ing] *out all the consequences of the illegal act*."[857]

A. Canada Must Fully Compensate GTH For Its Breaches Of The BIT

399. Part VII describes Canada's breaches of its obligations under the BIT. In particular, Canada breached its obligation to accord GTH's investment FET and FPS as a consequence of an accumulation of acts, which, *in toto*, caused GTH and its investment substantial harm. In fact, GTH recovered essentially nothing (*i.e.* C$ 11) as part of the ultimate sale of its investment. Canada's wrongful acts that resulted in this distressed sale included: (*i*) the duplicative CRTC Review proceedings; (*ii*) the failure to alleviate specified and acknowledged barriers to market entry; (*iii*) the unreasonable, arbitrary, and nontransparent national security review of GTHCL's Voting Control Application, without due process; and (*iv*) the blocking of GTH's right to sell Wind Mobile to an Incumbent.[858]

400. Applying the standard of compensation described above, Canada must make full reparation for the damages it has caused GTH as a result of its cumulative breaches of the BIT. That assessment requires the Tribunal to consider the scenario that would have "*in all probability*"[859] existed but for Canada's cumulative breach. As a result of Canada's breaches of the BIT, Canada left GTH with no alternative but to exit the market.[860] Thus,

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[857] **Exhibit CL-020**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Judgment, 13 September 1928, 1928 P.C.I.J. (Ser. A) No. 17, p. 47.

[858] The latter two acts amount to separate and independent breaches of Canada's obligations under the BIT.

[859] **Exhibit CL-020**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Judgment, 13 September 1928, 1928 P.C.I.J. (Ser. A) No. 17, p. 47.

[860] *See supra* Part V.D.

in all probability, but for Canada's breaches, GTH would not have sold Wind Mobile to the AAL Consortium in September 2014. If Canada had upheld the commitments it made in the 2008 AWS Auction Framework and had not adopted its unlawful measures which caused GTH's exit, GTH would, in all likelihood, have continued to hold its investment.[861] Moreover, any set-aside licenses purchased during the 2008 AWS Auction would have been freely transferrable to an Incumbent.

401. Numerous tribunals have held that damages resulting from a breach of an investment treaty must be valued "*at the time of the indemnification*," effecting *Chorzów*'s mandate that compensation must, as far as possible, "*wipe out all the consequences of the illegal act*."[862] Several cases have accordingly assessed damages as of the date of the award, taking into account the information available as to the evolution of the investment up until that date.[863]

402. In the present case, Messrs. Dellepiane and Spiller have been able to assess the *but-for* damages to GTH in the circumstance where GTH would have been able to obtain voting

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[861] **CWS-Dry**, ¶¶ 29-30 (describing that [redacted] **CWS-Dobbie**, ¶ 41.

[862] **Exhibit CL-020**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Judgment, 13 September 1928, 1928 P.C.I.J. (Ser. A) No. 17, p. 48.

[863] *See* **Exhibit CL-061**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶¶ 706-10 (finding that the "*value of the property should be determined with reference to a date subsequent to that of the internationally wrongful act, provided the damage is '*financially assessable*', therefore not speculative*"); **Exhibit CL-086**, *Windstream Energy LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2013-22, Award, 27 September 2016, ¶ 484 (finding that the where the Claimant had not lost the full value of its investment resulting from a breach of FET "*the proper date of quantification of the damage to the investment, and accordingly of the Claimant's loss, is the date of the award*"). *See also* **Exhibit CL-043**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶ 352 ("*Under customary international law, Siemens is entitled not just to the value of its enterprise as of May 18, 2001, the date of expropriation, but also to any greater value that enterprise has gained up to the date of this Award, plus any consequential damages*.").

control over its investment and would have been able to sell its investment to an Incumbent five years after acquiring its licences. However, based on currently available information, they are not able to assess the additional damage suffered by GTH as a result of the cumulative effect of all four of Canada's measures. In particular, they cannot at present accurately assess the damage resulting from Canada's duplicative and inconsistent O&C review process (which, among other things, delayed Wind Mobile's launch) and Canada's failure to enforce mandatory roaming and tower/site sharing (which, among other things delayed Wind Mobile and increased operational costs substantially). In circumstances where damages cannot be accurately ascertained for all of the measures taken by the host state, it is well-accepted that the amount invested by Claimant, updated at an appropriate rate of return, is an appropriate measure of the "*compensation sufficient to eliminate the consequences of the* [host state's] *actions.*"[864] Accordingly, GTH claims US$ 1.75 billion in damages on the basis of its Investment Value.

403. In the alternative, Messrs. Dellepiane and Spiller are able to calculate the *but-for* fair market value ("**FMV**") of GTH's investment with respect to the two later-in-time measures through which Canada's unlawful conduct was perfected—*i.e.*, Canada's denial of GTH's Voting Control Application and Canada's blocking of GTH's transfer of its investment to an Incumbent. The damages resulting to GTH on this alternative approach is approximately US$ 1.25 billion.

404. Both of these approaches are discussed in more detail in the sections that follow..

[864] **Exhibit CL-045**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶ 8.3.13.

B. Canada Must Compensate GTH US$ 1.75 Billion For The "Investment Value" Of Its Investment

405. As explained above, the "*investment value*" approach is a well-accepted and commonly applied measure of damages in circumstances where the true loss suffered by Claimant is otherwise difficult to assess.[865] Indeed, this approach is consistent with *Chorzów*'s basic principle of restitution in that it seeks to "*wipe out all the consequences*" of Canada's wrongful acts by returning to GTH its original investment.[866]

406. The "*investment value*" approach does not, however, take into account the true *but-for* world in which GTH would have remained invested in Wind Mobile if Canada's wrongful acts had not taken place, because it is not possible for Messrs. Dellepiane and Spiller to accurately assess the total damages in those circumstances. In particular, based on the information currently available, Messrs. Dellepiane and Spiller are not able to adequately

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[865] **Exhibit CL-045**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶¶ 8.3.13, 8.3.20; **Exhibit CL-076**, *Hassan Awdi, Eterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, 2 March 2015, ¶ 514 (awarding investment value where, among other things, the Tribunal found that there were "uncertainties regarding future income and costs of an investment in this industry in the Romanian market."); **Exhibit CL-081**, *Copper Mesa Mining Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-2, Award, 15 March 2016, Part 7, 7.26, 7.29 (finding "*the Claimant has itself suffered some legal harm. That much is certain. What is uncertain is the proven extent of that legal harm, quantified as compensation payable by the Respondent. . . .* [T]*he Tribunal intends to restore the Claimant to the status quo ante, where it would have never been an investor in the Junin and Chaucha concessions. . . . Anything less could not compensate the Claimant for the loss of its investments under Article VIII(1) of the Treaty or amount to the reparation required under the general principle enunciated in the Chorzów case, as here applied by the Tribunal.*"); **Exhibit CL-076**, *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, ¶ 514 (awarding investment value where, among other things, the Tribunal found that there were "*uncertainties regarding future income and costs of an investment in this industry in the Romanian market*").

[866] **Exhibit CL-045**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶¶ 8.3.13, 8.3.20.

ascertain the damage associated with Canada's duplicative and inconsistent O&C review and its failure to enforce mandatory roaming and infrastructure sharing.[867]

407. Applying the Investment Value Method, Messrs. Dellepiane and Spiller calculate the nominal value of damages owed to GTH to exceed **US$ 1.27 billion**, which, when updated to 21 September 2017, reaches over **US$ 1.75 billion**:[868]

	Nominal		Updated Investment		
			13-Mar-14	16-Dec-15	21-Sep-17
	C$ MM	US$ MM	US$ MM	US$ MM	US$ MM
Equity Investment	82.7	65.6	81.7	88.7	93.8
Operating Loan	805.1	785.2	896.6	973.9	1,032.1
Spectrum Loan	442.4	423.2	540.3	587.4	620.8
Value to Claimant	**1,330.2**	**1,274.0**	**1,518.6**	**1,650.0**	**1,746.7**

Figure 7: **CER-Dellepiane/Spiller**, *Table 11: Investment Value*.

C. In The Alternative, Canada Must Compensate GTH Over US$ 1.25 Billion For The *But-For* Fair Market Value Of GTH's Investment

408. Where possible, "it is well-accepted that reparation should reflect the 'fair market value' of the investment."[869] The FMV of an investment means:

> [T]*he price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a*

[867] **CER-Dellepiane/Spiller**, ¶ 11.

[868] **CER-Dellepiane/Spiller**, ¶ 99.

[869] **Exhibit CL-082**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 850; **Exhibit CL-061**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 702.

> *hypothetical willing and able seller, acting at arms length in an open unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.*[870]

409. To assess the actual damage caused to GTH, "tribunals have held that damage should compensate for the difference in the 'fair market value' of the investment resulting from the Treaty breach."[871] Therefore to the extent it is possible, the damage to GTH can be valued by calculating the FMV of GTH's investment but-for Canada's breaches, and then reducing this amount by the value that GTH received as a result of the September 2014 sale to the AAL Consortium.

410. As the definition makes clear, FMV is best calculated by reference to an actual arms' length sale of the investment in the same circumstances. However, where a sale transaction exists in similar, but not identical, circumstances, it is appropriate—and in fact preferred—to rely on this transaction, adjusted to take into account the particular circumstances of the case. As explained by the tribunal in *Burlington v. Ecuador* in the context of an expropriation:

> [A] *valuation will obviously be more accurate and reliable* ***if actual information is used in respect of relevant facts*** *that have occurred between the expropriation and the award, rather than projections based on information available on the date of the expropriation.* ***The valuation will be closer to reality if the Tribunal decides with 'maximum information' rather than 'maximum ignorance'.***[872]

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[870] *See* **Exhibit CL-036**, *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 402 (citations omitted); **Exhibit CL-061**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 702 (citation omitted); **Exhibit CL-082**, *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶¶ 851-52 (citations omitted); **CER-Dellepiane/Spiller**, ¶ 81.

[871] **Exhibit CL-061**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 702.

[872] **Exhibit CL-088**, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, ¶ 332 (emphases added). *See also* **Exhibit CL-053**, *National Grid*

411. In this case, there exists an actual "*arms length*" transaction of Wind Mobile from a "*willing and able buyer*" and a "*willing and able seller*" to form a reliable and non-speculative basis from which to base a calculation of Wind Mobile's FMV—namely, the 2015 sale of Wind Mobile to Shaw. Adjusted to take into account the specific features of GTH's *but-for* scenario, this value appropriately reflects the FMV of Wind Mobile if Canada granted GTH's Voting Control Application and allowed GTH to transfer its AWS-1 spectrum to an Incumbent. This approach does not, however, account for the cumulative effect of the other measures adopted by Canada, which is why it is only offered in the alternative. The calculation of damages owed to GTH employing this approach is summarized below.

1. Key Market Events That Took Place After GTH Sold Wind Mobile In September 2014

412. As explained by Messrs. Dellepiane and Spiller, after GTH sold Wind Mobile to the AAL Consortium, several key events took place that impacted the value of Wind Mobile. These events—the most important of which are discussed below—are relevant for the purpose of assessing the value of Wind Mobile in the *but-for* scenario.

P.L.C. v. Argentine Republic, UNCITRAL, Award, 3 November 2008, ¶ 287 (in determining the price of the claimant's shares in the Argentine owned Transener, looking to the price paid for those shares in a comparable transaction between two third parties which, in the tribunal's view, provided "*valuable real-world data*" to determine the share price but-for the relevant breaches).

a. The AWS-3 Auction

413. In March 2015, Wind Mobile participated in the AWS-3 Auction and purchased three spectrum licenses, amounting to 544.2 million MHz-POP[873] of spectrum, for only C$ 56.4 million (the minimum bid price).[874] This implies a price per MHz-POP of C$ 0.10.[875] By contrast, the average price per MHz-POP of AWS set-aside spectrum licenses purchased by New Entrants during the 2008 AWS Auction (referred to in Messrs. Dellepiane and Spiller's report as "***AWS-1***" spectrum licenses) was C$ 1.07.[876] The Incumbents were required to pay even more, spending C$ 1.77 per MHz-POP during the 2008 AWS Auction and C$ 3.00 per MHz-POP during the AWS-3 Auction.[877] Wind Mobile was able to purchase the AWS-3 spectrum licenses at a substantial discount because Industry Canada had specifically set aside spectrum for operating New Entrants, and Wind Mobile was the only bidder.[878]

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873 "*MHz-POP*" is defined as "*the license's bandwidth measured in megahertz multiplied by the population covered by the license. This measurement summarizes the two most important factors in determining the value of a license, the bandwidth of the spectrum and the population density of the covered area, and is the standard metric used to measure the size of a spectrum license in the wireless industry. Price per MHz-POP is computed as License Price ÷ (MHz of license x Population Covered), and is the standard way to compare auction results across different bands and markets*." **CER-Dellepiane/Spiller**, n. 73.

874 **CER-Dellepiane/Spiller**, ¶ 59. *See supra* Part V.E

875 **CER-Dellepiane/Spiller**, ¶ 59.

876 **CER-Dellepiane/Spiller**, ¶ 49.

877 **CER-Dellepiane/Spiller**, ¶ 49, Table 6.

878 *See* **Exhibit C-231**, Peter Evans, *Rogers buys no new spectrum as AWS-3 wireless auction raises $2.1B*, 6 March 2015, http://www.cbc.ca/news/business/rogers-buys-no-new-spectrum-as-aws-3-wireless-auction-raises-2-1b-1.2983178 (last visited 24 September 2017).

b. The Rogers-Mobilicity-Shaw Transaction

414. Thereafter, as discussed in Part V.E, in June 2015, Industry Canada permitted two transfers of set-aside spectrum license to Rogers which allowed Rogers to acquire Shaw's AWS-1 spectrum licenses and 100% of Mobilicity. As a condition of the transaction, Industry Canada required that Rogers transfer to Wind Mobile: (*i*) sixteen of Shaw's AWS-1 spectrum licenses; and (*ii*) all ten of Mobilicity's AWS-1 spectrum licenses.[879] For Wind Mobile, these spectrum licenses were essentially free; it provided Rogers only a 10 MHz portion of Wind Mobile's existing AWS-1 spectrum in the B Block in Southern Ontario.[880] In total, Wind Mobile received 26 AWS-1 spectrum licenses for a total of an additional 154 million MHz-POP in spectrum as part of this transaction.[881]

c. Shaw Purchases Wind Mobile

415. In December 2015, despite having exited the wireless telecommunications market in June 2015 when Industry Canada approved the sale of its AWS-1 set-aside spectrum licenses to Rogers, Shaw re-emerged to purchase Wind Mobile for an enterprise value of C$ 1.6 billion.[882] In Shaw's view, market conditions from the time at which it decided to exit the wireless market to December 2015 had improved for New Entrants and Wind Mobile in such a way that after having "*abandon*[ed] *plans to become a national wireless*

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879 **CER-Dellepiane/Spiller**, ¶ 64.

880 **CER-Dellepiane/Spiller**, ¶ 63.

881 **CER-Dellepiane/Spiller**, ¶ 64, Table 7.

882 **CER-Dellepiane/Spiller**, ¶ 69. *See supra* Part V.D.

carrier," it was now interested in re-entering the market in light of these changed conditions.[883]

416. At the time of this sale, Wind Mobile's spectrum holding comprised of: (*i*) 253 million MHz-POP of spectrum acquired during the 2008 AWS Auction; (ii) 544 million MHz-POP acquired during the AWS-3 Auction; and (*iii*) 220 million MHz-POP received from the Rogers-Mobilicity-Shaw transaction in June 2015.[884] As reflected below, in total, in December 2015 Wind Mobile held 1.018 billion MHz-POP of spectrum.[885]

[883] *See* **Exhibit C-239**, *Shaw sees profit surge 44% on sale of spectrum to Rogers*, CBC, 22 October 2015, http://www.cbc.ca/news/business/shaw-earnings-october-2015-1.3283929 (last visited 24 September 2007) (last visited 24 September 2017); **Exhibit C-243**, Christine Dobby, *Shaw's Wind Mobile purchase shakes up Canadian telecom industry*, THE GLOBE & MAIL, 17 December 2015 ("*The cable operator abandoned plans to build its own cellular network from scratch in 2011, but executives said during a conference call that they spent the past 18 months examining various options for an entry into the mobile market and then "pro-actively" approached Wind Mobile.*").

[884] **CER-Dellepiane/Spiller**, ¶ 69.

[885] **CER-Dellepiane/Spiller**, ¶ 69.

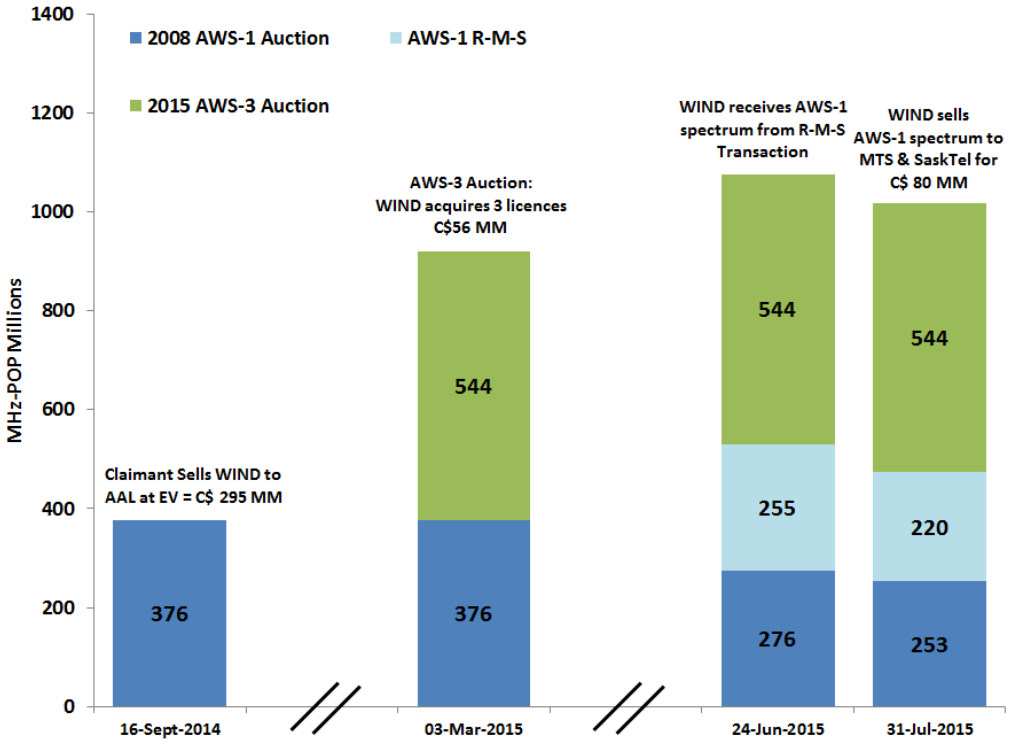

Figure 8: **CER-Dellepiane/Spiller**, *Figure 3: Evolution of Wind Mobile's Spectrum (Sept 2014-Dec 2015)*

417. Of the enterprise value of C$ 1.6 billion, Shaw announced that C$ 1.08 billion was attributable to the value of Wind Mobile's spectrum, and C$ 520 million to its operating value.[886] Attributing the C$ 1.08 billion spectrum value to the 1.018 billion MHz-POP of the spectrum, Shaw paid C$ 1.06 per MHz-POP for Wind Mobile's spectrum.[887] Incorporating the operating value of Wind Mobile into the per MHz-POP price, Shaw paid C$ 1.57 per MHz-POP.[888]

[886] **CER-Dellepiane/Spiller**, ¶ 70, Table 10.

[887] **CER-Dellepiane/Spiller**, ¶ 70, Table 10.

[888] **CER-Dellepiane/Spiller**, ¶ 70, Table 10.

2. Calculating The Damage Caused To GTH In The *But-For* Scenario

418. To calculate the damages caused to GTH as a result of Canada's breaches, Messrs. Dellepiane and Spiller: (*i*) calculate the FMV of Wind Mobile (or the "*Enterprise Value*") but for Canada's breaches; and (*ii*) adjust this FMV to account for third-party debt obligations, operations cash flows, and other factors. As described above, but for Canada's breaches of the BIT with respect to the Voting Control Application and ability to transfer spectrum to an Incumbent after five years, in all probability GTH would not have sold Wind Mobile in September 2014 and would have continued investing and operating Wind Mobile. Moreover, Wind Mobile's holding of AWS-1 set-aside spectrum licenses would have been freely transferrable to an Incumbent because, in a *but-for* world, the new 2013 Transfer Framework would not have blocked GTH from selling Wind Mobile's set-aside spectrum licenses to an Incumbent. The calculation of the FMV of Wind Mobile in this *but-for* scenario, and the damage caused as a result of Canada's breaches, is set out below.

419. Messrs. Dellepiane and Spiller rely on the December 2015 sale of Wind Mobile to Shaw to calculate the FMV of Wind Mobile as that transaction marks the actual sale of the very investment in question as between a willing buyer and willing seller (with control over the investment). Of course, that sale does not account for the fact that Wind Mobile's AWS-1 spectrum should have been transferable to an Incumbent, and, accordingly, some adjustments to the price paid by Shaw need to be made to account for this difference in the *but-for* scenario. Likewise, that transaction does not account for the unlawful regulatory and O&C-related conduct by Canada, however Messrs. Dellepiane and Spiller are, at present, unable to calculate the damage suffered by GTH as a result of those measures with

sufficient precision, and, as such, do not calculate any additional losses for these breaches in the present valuation method (thereby underestimating the damage to GTH).

420. Ideally, Mr. Dellepiane and Dr. Spiller would have had a transaction as close to the date of the award as possible to best capture the actual damage to GTH. And, as Mr. Dellepiane and Dr. Spiller explain, "[e]*stimating Wind Mobile's but for fair market value] as at a date closer to the date of this report would require* [them] *to make assumptions on the evolution of Wind Mobile's capital and operating expenditures, subscriber levels, revenues per subscriber, accounts receivables and payables, commercial and financial debts and interest payments, depreciation, tax carry forwards, and other operational and financial information, which* [they] *cannot do reliably with the information currently available.*"[889] They therefore use December 2015 as the date of valuation on the assumption that GTH would have sold its investment at that time, at the earliest.[890] GTH reserves the right to update the damages it has suffered up until the date of award if that calculation can be performed reliably on the basis of information not currently available.

a. The FMV Of Wind Mobile But For Canada's Breaches

421. As explained above, to establish the enterprise value of Wind Mobile as of December 2015, Messrs. Dellepiane and Spiller are informed by the December 2015 sale of Wind Mobile to Shaw (an "*arms length*" transaction of Wind Mobile between a "*willing and able buyer*" and a "*willing and able seller*"), adjusted to reflect a world in which Canada's breaches of the BIT had not occurred. First, accounting for a scenario in which Industry Canada would

[889] **CER-Dellepiane/Spiller**, ¶ 110.

[890] **CER-Dellepiane/Spiller**, ¶ 110.

have allowed New Entrants to sell their set-aside spectrum licenses to an Incumbent, they make the following adjustments:

(a) **Deduction to Wind Mobile's total spectrum holding**: In the Rogers-Mobilicity-Shaw transaction, Rogers would likely have been permitted to keep the AWS-1 set-aside spectrum licenses that it was required to give to Wind Mobile. Thus, the total value of this spectrum must be deducted from the assumed overall holding by Wind Mobile in December 2015.[891]

(b) **Calculation of the value of Wind Mobile's AWS-1 spectrum licenses to an Incumbent**: An Incumbent, rather than Shaw (a non-Incumbent), would have been permitted to purchase the AWS-1 spectrum licenses.[892] Using the price paid by Incumbents for AWS-3 spectrum licenses in 2015 (which best approximates the type of spectrum and the date on which it would have been purchased), Messrs. Dellepiane and Spiller observe that an Incumbent would have paid on average C$ 3.00 per MHz-POP for Wind Mobile's AWS-1 spectrum licenses, rather than the C$ 1.06 per MHz-POP paid by Shaw for the spectrum alone.[893]

422. Second, Messrs. Dellepiane and Spiller assess the operating value of Wind Mobile by relying on the operating value of C$ 520 million identified by Shaw in its purchase price for Wind Mobile in December 2015.[894] This operating value accounts for the value of Wind Mobile's subscribers and network, among other things.[895]

423. However, to unwind precisely Canada's breaches of FET and FPS to determine the full value of the damage caused to GTH, this operating value paid by Shaw must be adjusted to take into account the counterfactual that, but for Canada's breaches, Wind Mobile in all

[891] **CER-Dellepiane/Spiller**, ¶ 105.

[892] **CER-Dellepiane/Spiller**, ¶ 107.

[893] **CER-Dellepiane/Spiller**, ¶ 107.

[894] **CER-Dellepiane/Spiller**, ¶ 108.

[895] **CER-Dellepiane/Spiller**, ¶ 108.

probability would have had additional subscribers.[896] This assessment of Wind Mobile's operating value is, therefore, a conservative estimate of the true FMV of Wind Mobile but for Canada's breaches.

424. Applying the above, Messrs. Dellepiane and Spiller calculate a FMV of C$ 2.16 billion for Wind Mobile as of December 2015:

C$ million as of December 2015	
Spectrum Value	1,640.9
Operating Value	520.0
Wind Mobile's *But for* Fair Market Value	**2,160.9**

Figure 9: **CER-Dellepiane/Spiller**, *Table 13: Wind Mobile's* But for *Fair Market Value as of December 2015 (Instruction 2)*

b. Calculation Of Damages

425. From this C$ 2.16 billion enterprise value, Messrs. Dellepiane and Spiller deduct the operating cash flow deficit,[897] third party debt Wind Mobile would have owed,[898] and the C$ 54 million that would have been paid to AAL after it exercised its liquidity right on 27

[896] *See* **CWS-Campbell**, ¶ 20. In particular, if the duplicative ownership and control reviews had not delayed Wind Mobile's launch, and if Wind Mobile had received reasonable roaming and tower sharing conditions.

[897] **CER-Dellepiane/Spiller**, ¶ 111.

[898] **CER-Dellepiane/Spiller**, ¶¶ 113-14.

December 2013.[899] Accordingly, Messrs. Dellepiane and Spiller estimate the damages to GTH's debt and equity holdings at C$ 1.53 billion and C$ 79.9 million respectively.[900]

3. The Damage Caused To GTH Is Approximately US$ 1.25 Billion

426. Applying the methodology above, Messrs. Dellepiane and Spiller calculate the damages, updated with an estimate of the cost of debt of wireless operators, to be **US$ 1.25 billion**:[901]

Millions	C$	US$
But for Value of Wind Mobile (Enterprise Value)	**2,160.9**	
(-) Senior Facility Debt	189.2	
(-) VimpelCom Debt	210.2	
(-) AAL Liquidity Right	57.1	
(+) Operating FCF as of DoV	(91.6)	
(-) GTH's Debt	1,532.3	
But for Value of Equity to Wind Mobile Shareholders	**80.5**	
GTH's equity %	*99.3%*	
But for Value for GTH's Equity	**79.9**	
Damages to GTH's Debt as of Dec. 16, 2015	**1,532.3**	
Damages to GTH's Equity as of Dec. 16, 2015	**79.9**	
Total Damages to GTH as of Dec. 16, 2015	**1,612.2**	**1,170.0**
Compound factor		*1.07*
Total Damages to GTH as of Sept. 21, 2017		**1,250.2**

Figure 10: **CER-Dellepiane/Spiller**, *Table 16: Damages to GTH's Debt and Equity Holdings (Instruction 2)*

899 **CER-Dellepiane/Spiller**, ¶¶ 115-16

900 **CER-Dellepiane/Spiller**, ¶¶ 118-19.

901 To assess the reasonableness of this assessment of damages owed to GTH, Messrs. Dellepiane and Spiller have also been instructed to value the damages resulting from independent breaches of the BIT. Those assessments are contained in their report. *See generally* **CER-Dellepiane/Spiller**.

IX. REQUEST FOR RELIEF

427. On the basis of the foregoing, without limitation and reserving GTH's right to supplement these prayers for relief, GTH respectfully requests that the Tribunal:

(a) **DECLARE** that Canada has breached its obligations to GTH under the BIT;

(b) **ORDER** Canada to pay GTH in excess of US$ 1.75 billion to be updated as of the date of the Award;

(c) **ORDER** Canada to pay all of the costs and expenses of the Arbitration, including GTH's legal and expert fees, the fees and expenses of any experts, the fees and expenses of the Tribunal, and ICSID's other costs; and

(d) **AWARD** such other relief as the Tribunal considers appropriate.

428. GTH reserves its right to specify, supplement or amend the factual or legal claims and arguments contained herein, as well as the relief requested.

Dated: 29 September 2017

For and on behalf of Global Telecom Holding S.A.E.

Gibson Dunn & Crutcher LLP

GIBSON, DUNN & CRUTCHER LLP