Federal Court  Cour fédérale

Date: 20211022

Docket: T-1335-21

Citation: 2021 FC 1127

Ottawa, Ontario, October 22, 2021

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

TELUS COMMUNICATIONS INC.

Applicant

and

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

Respondents

ORDER AND REASONS

[1] The Minister of Industry held an auction for licences for radio spectrum intended to be used for 5G mobile phone networks. A portion of the spectrum was set aside for regional carriers, in order to foster greater competition in the market for mobile phone services. Vidéotron, a regional carrier, won such set-aside licences in Western Canada. TELUS, a national carrier, argues that Vidéotron was not eligible for such licences. It brought an application for judicial review of the Minister's decision to qualify Vidéotron and now seeks a stay of the issuance of the licences until a final decision is rendered in the judicial review.

[2] I am denying TELUS's motion for a stay. First, on the basis of the record currently before the Court, TELUS's arguments are untenable and do not raise a serious issue. There is no basis for TELUS's assertion that Vidéotron needed to have physical infrastructure in Western Canada to be eligible. Neither does the form summarizing the Minister's assessment of Vidéotron's eligibility raise any serious issue.

[3] Second, TELUS has not shown that it will suffer irreparable harm if the stay is granted. Although Vidéotron's entry will change existing market conditions, the same result would have obtained if another regional carrier had won the disputed licences. Indeed, this change in market conditions is the intended result of the Minister's decision to set aside spectrum for regional carriers. It is not causally linked to Vidéotron's alleged ineligibility and does not count as irreparable harm. Moreover, I am not convinced that the alleged harm is either irreversible or impossible to compensate in damages.

[4] Third, while each party may suffer inconvenience if the stay is granted or denied, the decisive factor is the public interest in fostering greater competition in the market for mobile phone services. This public interest weighs heavily in favour of denying the stay.

I. Background

A. *Statutory Framework*

[5] Mobile phone technology requires the use of electromagnetic waves of various frequencies. The electromagnetic spectrum is a public resource and its use is regulated under the *Radiocommunication Act*, RSC 1985, c R-2. Section 5(1)(a) of the Act empowers the Minister of Industry (who heads the Department of Innovation, Science and Economic Development or ISED) to issue "spectrum licences in respect of the utilization of specified radio frequencies within a defined geographic area." Such licences are necessary to the operation of any mobile phone network.

[6] Other aspects of mobile phone services, such as prices and terms of service, are regulated by the Canadian Radio-Television and Telecommunications Commission [CRTC], under the *Telecommunications Act*, SC 1993, c 38. Section 7 of the latter Act establishes a telecommunications policy, the objectives of which include the accessibility of telecommunications services in both urban and rural areas and the enhancement of efficiency and competitiveness. In recent years, in furtherance of the latter objective, the CRTC has taken a number of measures intended to foster greater competition in the market for mobile phone services. One such measure, to which I will return later in these reasons, is a policy allowing

"mobile virtual network operators" [MVNO] to require national carriers to give them bulk access to their networks.

B. *Spectrum Auctions*

[7] Subsection 5(1.2) of the *Radiocommunications Act* authorizes the Minister to use a system of competitive bidding for the attribution of spectrum licences. In particular, pursuant to subsection 5(1.4), the Minister may prescribe rules for the bidding process, including bidders' qualifications.

[8] Spectrum licences are issued for geographic areas that are described as Tiers 2, 3 and 4. Tier 2 licences are for large areas that may correspond to a province. For example, British Columbia, Alberta and Manitoba are considered a Tier 2 area. Tier 4 areas are smaller and may correspond to a major city and its surroundings (for example, Vancouver) or to a larger rural area (for example, Grande Prairie).

[9] In recent years, the Minister has conducted several auctions for parts of the electromagnetic spectrum. These auctions included measures, described as "pro-competitive measures," intended to enhance competitiveness in the mobile phone services market, in particular "spectrum caps" and "spectrum set-asides." A spectrum cap is a limit on the width of spectrum that a single licensee may hold. A spectrum set-aside reserves a certain portion of the spectrum for certain entities. The goal of these measures is to facilitate entry in the market for carriers other than the "national mobile service providers" or NMSPs. The NMSPs are defined as those carriers with a market share of more than 10% at the national level. They are currently

TELUS, Bell and Rogers. The expression “regional carrier,” although not defined, is frequently used to refer to carriers other than the NMSPs.

C. *The 3500 MHz Spectrum Auction*

[10] In 2014, ISED announced its intention to reallocate what is known as the 3500 MHz band, which comprises frequencies between 3475 MHz and 3650 MHz, to mobile services. These frequencies are expected to be critical to the development of fifth-generation [5G] mobile services in Canada. In 2019, it launched a consultation regarding the main parameters of an auction for this band.

[11] One of the consultation issues was the nature of the pro-competitive measures that would be part of the auction process. Several government entities, in particular from Western Canada, generally supported the adoption of pro-competitive measures. Several regional carriers supported both a spectrum cap and spectrum set-asides. Québecor, Vidéotron’s parent company, supported spectrum set-asides but not spectrum caps. Bell and TELUS disputed the need for pro-competitive measures; in the alternative, they asserted that only a spectrum cap should be imposed. Rogers agreed with a spectrum cap.

[12] In March 2020, ISED issued the *Policy and Licencing Framework for Spectrum in the 3500 MHz Band* [the Policy Framework]. It is a complex document describing all aspects of the auction process. Only the relevant aspects are described below.

[13] ISED reached the conclusion that pro-competitive measures were required, for the following reasons:

> …there is a risk that competition in the 5G mobile wireless market could suffer if regional service providers do not acquire sufficient spectrum. In their recent submission to the Canadian Radio-television and Telecommunications Commission's (CRTC) review of mobile wireless services in 2019, the Competition Bureau found that the NMSPs possess retail market power, indicated by high concentration, high profitability, and high barriers to entry. The Competition Bureau also found that in areas where the NMSPs face a facilities-based regional service provider, prices are significantly lower.

[14] Based on stakeholders' submissions and its experience in previous auctions, ISED determined that it would use a spectrum set-aside, but not a spectrum cap. Thus, a spectrum width of 50 MHz, or about 25% of the available spectrum, would be reserved. The rest of the spectrum was "open," in the sense that all carriers, including national carriers, could bid for it.

[15] The next relevant issue was the definition of the eligibility to bid for this set-aside spectrum. Having considered the submissions of various stakeholders, ISED defined the eligibility criteria for the set-aside spectrum as follows:

> … those registered with the CRTC as facilities-based providers, that are not National Mobile Service Providers, and that are actively providing commercial telecommunications services to the general public in the relevant Tier 2 area of interest, effective as of the date of application to participate in the 3500 MHz auction.

[16] As stakeholders had raised questions about certain aspects of this definition, ISED provided the following clarifications. First, any services regulated under the *Telecommunications*

Act, not only mobile phone services, would qualify. Second, the concept of "general public" would be understood as follows:

> The definition of "general public" was raised as a potential issue concerning service providers that offer their services to industries, vertical markets, private networks, and other "non-traditional" consumers. For the purposes of this decision, "general public" can include businesses, enterprises and institutions, as well as "traditional" residential consumers. Therefore, providers who are actively offering commercial telecommunications services to any of these consumers will be considered set-aside-eligible as long as they meet the additional eligibility criteria.

[17] It should also be kept in mind that while licences are issued for Tier 4 areas, a bidder would qualify for set-aside spectrum if it offers services anywhere in the wider Tier 2 area that encompasses the Tier 4 area for which a licence is issued. For example, a bidder offering services in the Edmonton Tier 4 area would be eligible for a licence for the Calgary Tier 4 area, as both cities are in the same Tier 2 area.

[18] Vidéotron applied to be recognized as a set-aside bidder in British Columbia, Alberta and Manitoba. (For the sake of brevity, I will refer to these three provinces as "Western Canada.") It asserted that it was eligible based on the services provided by its subsidiary, Fibrenoire inc. [Fibrenoire]. It provided documentation showing that although Fibrenoire does not offer services to consumers, it offers various types of Internet and fibre optic services to businesses in several cities in these three provinces. Based on that information, ISED accepted that Vidéotron was eligible to bid for set-aside spectrum in these three provinces.

[19] The auction took place in June and July 2021. The results were made public on July 29. Vidéotron won a large number of licences for areas in Quebec and Ontario, mostly in the set-

aside auction. They are not the subject of these proceedings. In addition, it won 69 licences in British Columbia, 40 in Alberta and 21 in Manitoba. All but two of these licences were in the set-aside auction. The auction generated revenues of $8.91 billion, of which approximately $830,000,000, are attributable to the licences won by Vidéotron.

[20] Industry participants and observers were not expecting Vidéotron to be able to acquire set-aside spectrum outside of Quebec and Ontario. For example, when the results were made public, Desjardins Capital Markets stated that “Prior to seeing the auction results, we were not sure if [Vidéotron] was eligible to bid on set-aside spectrum outside of its current footprint.”

[21] On August 3, 2021, TELUS wrote to ISED to express its surprise at Vidéotron’s qualification for the set-aside spectrum in Western Canada, because it was unaware of any activities of Vidéotron in this part of the country. It requested that ISED provide its decision, analysis and supporting evidence regarding Vidéotron’s eligibility. On August 11, 2021, ISED responded that Vidéotron became eligible through services provided by its affiliate, Fibrenoire, which is a registered provider under the *Telecommunications Act*. ISED asserted that it was satisfied that Fibrenoire provided services in the relevant areas, but declined to forward details of Vidéotron’s application to TELUS, as it contained confidential information, in particular clients’ names.

[22] On August 26, 2021, TELUS began an application for judicial review of ISED’s decision to qualify Vidéotron for bidding on set-aside spectrum in Western Canada. On September 20,

2021, TELUS brought the present motion, then described as a motion for an interlocutory injunction, to prevent the issuance of the disputed licences.

[23] ISED initially intended to issue the licences on October 4, 2021; it delayed the issuance until the end of October, for reasons unrelated to the present litigation.

II. Analysis

[24] While TELUS initially sought an interlocutory injunction, it now describes the remedy it is seeking as more akin to a stay of proceedings pursuant to section 18.2 of the *Federal Courts Act*, RSC 1985, c F-7. Nothing turns on this distinction, as interlocutory injunctions and stays of proceedings are governed by the same principles, and I will use both terms interchangeably.

[25] The purpose of a stay of proceedings or interlocutory injunction is "to ensure that the subject matter of the litigation will be "preserved" so that effective relief will be available when the case is ultimately heard on the merits": *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at paragraph 24, [2017] 1 SCR 824 [*Google*]. In deciding whether to issue an interlocutory injunction or a stay, Canadian courts employ a three-part test derived from the decision of the British House of Lords in *American Cyanamid Co v Ethicon Ltd*, [1975] AC 396. The best known statement of this test is found in the Supreme Court of Canada's decision in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at 334 [*RJR*]:

> First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer

> greater harm from the granting or refusal of the remedy pending a decision on the merits.

[26] The first two steps of this method aim at assessing the risk of harm for the plaintiff if the injunction is not granted. At the third step, this risk is compared to the risk of harm to the defendant if an injunction is issued but the defendant later prevails at trial. Harm to third parties and the public interest may also be considered at that stage: *RJR*, at 343–347.

[27] The three prongs of the *RJR* test should not be applied in a mechanistic fashion. While each of the three prongs must be met, strength on one prong may compensate weakness on another: *Mosaic Potash Esterhazy Limited Partnership v Potash Corporation of Saskatchewan Inc*, 2011 SKCA 120 at paragraph 26 [*Mosaic Potash*]; *Monsanto v Canada (Health)*, 2020 FC 1053 at paragraph 50 [*Monsanto*]; *Spencer v Canada (Attorney General)*, 2021 FC 361 at paragraph 51; *Singh v Canada (Citizenship and Immigration)*, 2021 FC 846 at paragraph 17. In the end, "The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context-specific": *Google*, at paragraph 25.

[28] Flexibility in the application of the *RJR* test, however, does not extend to the point that an injunction or stay may be granted when one of the prongs of the test is not satisfied. Each component of the test performs a specific function and must be met: *Janssen Inc v Abbvie Corporation*, 2014 FCA 112 at paragraphs 19-26. It is mainly at the third stage of the test that the relative weight of competing factors can be balanced.

A. *Serious Issue*

[29] We can now turn to the first prong of the *RJR* framework, namely, whether the application raises a serious issue. I will first explain what is meant by "serious issue," and then apply this test to the present case.

(1) The Test

[30] The first step of the test for granting a stay or interlocutory injunction is a preliminary review of the merits of the case. In most cases, the applicant need only convince the judge that the case raises a serious issue. A serious issue is a low threshold. It is not necessary to show that the applicant is likely to succeed. In *RJR*, at 337-338, the Supreme Court commented as follows on this first part of the test:

> What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case.
>
> […]
>
> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

[31] There are practical reasons for not engaging in a detailed review of the merits of the underlying case when deciding a motion for an interlocutory injunction: *Mosaic Potash*, at paragraphs 37-40. Moreover, as the Alberta Court of Appeal stated in *AC and JF v Alberta*, 2021

ABCA 24 at paragraph 30, “Even weak cases may be entitled to interlocutory relief if the other aspects of the test weigh heavily in that direction.”

[32] Nevertheless, this component of the test performs an important function and should not be seen as merely formal or automatically satisfied. As my colleague Justice William F. Pentney stated in *Skibsted v Canada (Environment and Climate Change)*, 2021 FC 301 at paragraph 33 [*Skibsted*], “This branch of the test seeks to ensure that otherwise lawful activity is not stopped where the main lawsuit is destined to fail because it is totally lacking in merit.”

[33] When the underlying proceeding is an application for judicial review, the serious issue prong of the test must be assessed keeping in mind that the applicant will have to show, on the merits of the application, that the decision challenged is unreasonable: *Monsanto*, at paragraph 58. Thus, in this case, TELUS must show that the reasonableness of the Minister’s decision gives rise to a serious issue or, to phrase this differently, that there is a non-frivolous argument that the decision is unreasonable. In this process, the applicant bears the burden of demonstration: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 100 [*Vavilov*].

[34] There are some circumstances where someone who applies for a stay or an interlocutory injunction must show a higher probability of prevailing on the merits. Despite Vidéotron’s arguments, this case does not fall into one of these categories. In particular, this is not a situation where, given time constraints, the case is unlikely to proceed on the merits and the interlocutory injunction “will in effect amount to a final determination of the action”: *RJR*, at 338. Even if

TELUS's motion is dismissed, there is no reason why the application could not be heard on the merits. The mere fact that the relief sought on an interim basis is the same as that sought in the application is not sufficient to require more than a serious issue.

(2) Assessment

[35] At this stage of the proceedings, TELUS's application for judicial review does not raise a serious issue. The manner in which TELUS has presented the grounds for its application has varied somewhat, but these grounds can be summarized as follows. First, TELUS asserts that to qualify as a set-aside bidder, Vidéotron must have a physical network in Western Canada, which it does not have. Second, TELUS states that, on its face, ISED's assessment form of Vidéotron's application shows that it did not qualify. Third, TELUS relies on various statements made by Vidéotron, Fibrenoire or industry observers for its assertion that Vidéotron has no activities in Western Canada.

[36] In my view, TELUS's submissions do not raise a defect that comes anywhere near the high standard for demonstrating that a decision is unreasonable. I hasten to add that I reach this conclusion without engaging in any review of disputed evidence. Simply put, based on the uncontradicted evidence before me, TELUS's arguments are untenable.

[37] At this juncture, I would also add that TELUS's submissions do not raise procedural fairness issues not subject to the reasonableness standard of review. Determining a bidder's eligibility for the set-aside spectrum is a purely administrative process. It does not involve a hearing, and other prospective bidders are not interested parties who may review their

competitors' applications and make submissions. Simply put, TELUS had no participatory rights with respect to ISED's decision regarding Vidéotron's eligibility. Moreover, in response to a request for clarification, ISED stated that it would not publish documentation revealing the basis for a bidder's eligibility for the set-aside spectrum.

(a) *No Physical Network in Western Canada*

[38] TELUS's assertion that Vidéotron must have a physical network in Western Canada to qualify for set-aside spectrum in that region is plainly contradicted by the Policy Framework. The definition, which I already quoted above, can be broken down into three components:

(1) "…those registered with the CRTC as facilities-based providers…"

(2) "… that are not National Mobile Service Providers …"

(3) "… and that are actively providing commercial telecommunications services to the general public in the relevant Tier 2 area of interest…"

[39] TELUS acknowledges that Vidéotron and Fibrenoire meet conditions (1) and (2). It says, however, that a set-aside bidder must, to satisfy condition (3), use its own facilities in the relevant Tier 2 area to provide telecommunications services.

[40] There is simply no way in which TELUS's interpretation can be reconciled with the language of the Policy Framework. The three conditions are clearly disjunctive, as reflected in the structure of ISED's assessment form. If there were any doubt in this regard, it would be dispelled by an answer provided by ISED in response to a clarification question:

> As long as the applicant itself is not affiliated with or controlled by a national mobile service provider, and where one or more affiliates or controlling partners of the applicant is registered with the Canadian Radio-television and Telecommunications Commission (CRTC) as a facilities-based provider, that applicant may be qualified as set-aside-eligible to bid <u>in all licence areas where an affiliate or controlling partner is actively providing commercial telecommunications services to the general public</u> in the relevant Tier 2 service area, as set out in section 6.1 of the Framework. [emphasis added]

[41] TELUS nevertheless argues that the purpose of setting aside spectrum was to help small providers to extend their existing networks in their own Tier 2 areas, not to allow out-of-province carriers such as Vidéotron to enter the market. This, again, is contrary to the manner in which the conditions of eligibility to bid for set-aside spectrum are drafted and to the clarification provided by ISED. Moreover, The Policy Framework does not distinguish between large and small regional carriers; nor does it make eligibility conditional on the location of a carrier's head office or similar factors.

[42] On judicial review, it is not enough to put forward an alternative interpretation of the governing provisions, if the interpretation adopted by the decision-maker is clearly compatible with the text and context and, therefore, reasonable: *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at paragraphs 40–41, [2013] 3 SCR 895. TELUS has simply not raised any tenable argument that ISED's interpretation of its own criteria is unreasonable.

(b) *The Assessment Form*

[43] TELUS's second angle of attack is to assert that, on its face, ISED's assessment form, which is to be considered as the reasons for the decision, reveals that Vidéotron was not eligible.

More specifically, TELUS argues that ISED failed to apply its own guidelines, found in the Policy Framework, by not requiring documents evidencing Fibrenoire's "retail/distribution network." It also submits that because Fibrenoire's activities are described as those of a "wholesaler," it is not providing services directly to the public.

[44] On judicial review, "reasons given by an administrative body must not be assessed against a standard of perfection": *Vavilov*, at paragraph 91. They "must be read holistically and contextually": *Vavilov*, at paragraph 97. Bearing this in mind, I do not find that the improprieties alleged by TELUS raise a serious argument that might render the decision unreasonable.

[45] As to the first issue, the assessment form indicates that Fibrenoire's "retail/distribution network" was verified by phone instead of merely relying on documents. I see nothing here that could render the decision unreasonable, especially as the assessment form itself provided that, with respect to other criteria, ISED would perform its own verification, either through websites, email or phone, instead of merely relying on documents provided by the applicant.

[46] As to the second issue, the assessment form indicates that, in the relevant Tier 2 areas in Western Canada, Vidéotron "provides OTT [over the top] services to businesses through affiliate 'Fibrenoire.'" In another part of the form, however, the conclusion is that Vidéotron "provides internet service to businesses through Fibrenoire as wholesaler." TELUS makes much of the use of the word "wholesaler," which would indicate, in its view, that Fibrenoire would be providing services to other communications companies, not directly to business clients.

[47] Without more, I am unable to conclude that the use of one word creates a serious issue that could render the decision unreasonable. Reasons must be read holistically. Here, ISED determined that Fibrenoire offers services to businesses and declared Vidéotron eligible on this basis. We simply do not know in what sense ISED used the word "wholesaler." It may simply have meant that Fibrenoire was offering telecommunications services in large quantities. One cannot speculate that ISED used the word in a sense that creates a contradiction with other parts of the decision. Such an exercise in semantics does not create a "sufficiently serious shortcoming" that makes the decision unreasonable: *Vavilov*, at paragraph 100.

[48] In reaching this conclusion, I am mindful that TELUS has not yet obtained an unredacted copy of ISED's record. It intends to bring a Rule 318 application to obtain information that Vidéotron asserts is confidential. I do not wish to comment on the merits of such motion. It may be that, at a later stage of the proceeding, TELUS will obtain information revealing shortcomings in the decision. I cannot, however, grant a stay of proceedings or an interlocutory injunction on the basis that this might happen. A serious issue must arise from the evidence currently before me. In this regard, a motion for a stay or for an interlocutory injunction is fundamentally different from a motion to strike, in which no evidence is brought and the facts alleged are taken as true unless manifestly absurd or unprovable.

[49] In *Vavilov*, at paragraph 94, the Supreme Court of Canada stated that a reviewing court must read the reasons in light of the "context of the proceedings," which includes the evidence and the submissions of the parties. At the hearing of this motion, I expressed surprise at the fact that the certified tribunal record had not yet been filed, pursuant to Rule 317. Counsel for the

Attorney General explained that, while the parties were already in possession of most of the decision-maker's record, he was waiting for the resolution of the confidentiality issue to file it. At my request, the day after the hearing, he filed the parts of the record on which no claim of confidentiality was made.

[50] The record contains an annex to Vidéotron's application, which provides detailed evidence as to how Vidéotron meets the eligibility requirements, as well as a letter Vidéotron wrote in response to ISED's request for clarification of certain issues. I do not intend to engage in a detailed analysis of these documents. Suffice it to say that they contain a detailed and precise description of the services offered by Fibrenoire in Western Canada (including the fact that equipment belonging to Fibrenoire is installed at its clients' premises) as well as an explanation of how Fibrenoire's sales force serves these clients. If anything, these documents show that the findings recorded in ISED's assessment form were based on detailed submissions made by Vidéotron. In addition, TELUS's assertion that "wholesaler" would mean that Fibrenoire only offers services to other telecommunications companies is hard to reconcile with these documents. I will simply say that I am puzzled by the fact that neither TELUS nor Vidéotron saw fit to include these documents, which were in their possession, in their motion records.

(c) *Extrinsic Evidence*

[51] Beyond the record, TELUS relies on extrinsic evidence to draw an inference that Vidéotron, through Fibrenoire, did not have qualifying activities in Western Canada. Judicial review, however, is based on the record before the decision-maker and extrinsic evidence is rarely admitted: *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at

paragraph 86. In any event, TELUS's evidence is too vague to justify any inference regarding Fibrenoire's activities. It is equally compatible with the inference that the latter were of a limited scope and were not noticed by other industry participants or observers.

[52] Thus, Mr. Péladeau's statement that Vidéotron's success in obtaining licences was the first step towards expansion outside Québec is not incompatible with the fact that Fibrenoire was already offering certain specialized services in Western Canada. Mr. Péladeau was obviously referring to Vidéotron's expansion in the mobile phone market. Vidéotron never asserted that Fibrenoire was offering mobile phone services. Likewise, statements found on Fibrenoire's website or in a 2016 press release, to the effect that it operated a fibre optic network in Montreal, Toronto, Ottawa and Quebec City, are not incompatible with the fact that it also offers certain services in Western Canadian cities.

[53] The fact that TELUS or industry observers were not aware of Fibrenoire's specialized activities does not justify an inference that they did not exist. The real issue is whether the Minister could declare Vidéotron eligible on the basis of the record before him. Nor does the fact that Vidéotron did not apply to qualify for set-aside spectrum in Western Canada in 2019 in a similar auction give rise to an inference that it was not eligible to do so in 2021.

[54] To summarize, I find that, based on the evidence currently in the record, TELUS's application does not raise a serious issue.

B. *Irreparable Harm*

[55] While the foregoing conclusion is sufficient to dispose of the case, I will also address the issue of irreparable harm, given the extensive submissions made by both parties on this subject. Again, I will proceed by first describing the test and then applying it to the case at hand.

(1) The Test

[56] Preventing irreparable harm is the raison d'être of stays and interlocutory injunctions. This is why the applicant must show that it is likely to suffer irreparable harm if the injunction does not issue. In *RJR* at 341, the Supreme Court of Canada explained the rationale and content of the test as follows:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision […]; where one party will suffer permanent market loss or irrevocable damage to its business reputation […]; or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined […].

[57] In a number of decisions, the Federal Court of Appeal has emphasized that a convincing demonstration of irreparable harm is required before a stay or an interlocutory injunction is

issued. For example, in *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at paragraph 31 [*Glooscap*], it stated:

> To establish irreparable harm, there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted. Assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight.

[58] Likewise, in *Canada (Attorney General) v Oshkosh Defense Canada Inc*, 2018 FCA 102 at paragraph 25, it stated that "to prove irreparable harm, the moving party must demonstrate in a detailed and concrete way that it will suffer real, definite, unavoidable harm—not hypothetical and speculative harm—that cannot be repaired later" or, at paragraph 30, that the moving party must "adduce specific, particularized evidence establishing a likelihood of irreparable harm."

[59] One requirement that is obvious but often not explicitly stated is that there must be a causal link between the alleged unlawful conduct and the harm. As the British Columbia Court of Appeal explained in *Vancouver Aquarium Marine Science Centre v Charbonneau*, 2017 BCCA 395 at paragraph 66 [*Vancouver Aquarium*], "the evidence must support that the harm is generated by that which is sought to be prohibited by the injunction." In that case, which was based on copyright infringement, the Court found that the alleged harm to reputation flowed essentially from parts of a publication other than those that were alleged to infringe the plaintiff's copyright. Thus, the interlocutory injunction was denied.

(2) Analysis

[60] TELUS argues that the attribution of licences to Vidéotron will result in irreparable harm. The argument can be subdivided in several discrete steps. TELUS first says that the licences will enable Vidéotron to begin offering mobile services in Western Canada before a decision is made on the application for judicial review. If this happens, Vidéotron will benefit from an unfair competitive advantage because of the discount it obtained by bidding on the set-aside spectrum. Its entry into the market will thus lead to a shift in competitive conditions, which TELUS says will be irreversible even if the application for judicial review is allowed. TELUS adds that the harm it will suffer cannot be adequately compensated by an award of damages. TELUS also highlights various forms of harm that will result to consumers or what it describes as the public interest.

[61] I do not agree that TELUS has demonstrated irreparable harm. As I explain below, the most fundamental reason is that the alleged harm results not from the acceptance of Vidéotron as a set-aside bidder, but from the structure of the auction itself, in which a portion of the spectrum is set aside for regional carriers. Because of this structure, the alleged harm will materialize in any event and is not causally linked to the issue of Vidéotron's eligibility. I also explain why TELUS fails to demonstrate the other components of its argument regarding irreparable harm.

(a) *Lack of Causal Link*

[62] At the outset, it must be emphasized that TELUS does not assert that it could have obtained the disputed licences. Rather, the alleged harm is the effect of Vidéotron's entry in the

market on competitive conditions. In this regard, TELUS insists heavily on the fact that Vidéotron would have benefitted from an unfair $1.1 billion discount by bidding on set-aside licences when it should not have been allowed to do so. This unfair advantage would enable Vidéotron to offer services at a lower price, forcing TELUS and others to follow suit.

[63] However, such “advantage,” no matter how one may characterize it, fundamentally flows from ISED’s decision to set aside certain spectrum blocks for regional carriers. The explicit goal was to allow regional carriers to acquire spectrum at a discount, in order to foster greater competition in the market for mobile services. Giving an “advantage” to regional carriers was seen as necessary to level an uneven playing field. While national carriers may disagree with the set-aside, and argued against it during ISED’s consultation process, they cannot characterize its intended consequences as a form of irreparable harm to be avoided by applying to the Court.

[64] Yet, this is exactly what TELUS is doing. The harm it alleges flows from the decision to set aside spectrum for regional carriers, not the fact that Vidéotron won a certain number of licences. In other words, the harm would also have materialized if Vidéotron had not qualified to bid on set-aside spectrum in Western Canada. Presumably, other regional carriers would have won the disputed licences and would have benefited from a similar competitive advantage. During cross-examination, both Mr. Edora and Dr. Dippon, TELUS’s witnesses, recognized that those regional carriers would have benefited from the same “unfair” discount as Vidéotron and would have been in a position to cause the same kind of market shift or disruption.

[65] In other words, there is no causal link between the harm alleged by TELUS and the attribution of licences to Vidéotron. No stay or injunction should issue to prevent harm that would have taken place in any event.

[66] During oral argument, TELUS argued that causation in this case should not be assessed by inquiring into what would have happened in a hypothetical world where the unlawful conduct that forms the basis of it claim would not have taken place. It would be enough to show that the harm will result if the stay is denied. I disagree. The "but-for world" is a well-accepted tool to assess causation: see, for example, *Snell v Farrell*, [1990] 2 SCR 311 at 320; *Monsanto Canada Inc v Schmeiser*, 2004 SCC 34, at paragraphs 101-104, [2004] 1 SCR 902; *Clements v Clements*, 2012 SCC 32 at paragraph 8, [2012] 2 SCR 181.

[67] In cross-examination, TELUS's witnesses also suggested that Vidéotron has more financial resources, experience and expertise than smaller providers. This may be true, but it does not detract from the fundamental fact that the harm alleged by TELUS is the result that the Policy Framework intends to achieve. That this result will be achieved more or less quickly or effectively depending on the identity of the successful bidder does not change the fact that TELUS cannot rely on it to seek a stay or an injunction.

[68] Vidéotron also argued that TELUS's argument regarding irreparable harm constitutes a collateral attack on ISED's Policy Framework with respect to the structure of the auction. As TELUS did not seek judicial review of the Policy Framework, it would be barred from indirectly challenging it in the course of the present proceeding. As I prefer to analyze the issue from the

perspective of causation, it is not necessary for me to address Vidéotron's collateral attack argument.

(b) *Irreversible Market Distortion*

[69] Even if the harm alleged by TELUS were caused by the attribution of the disputed licences to Vidéotron, TELUS fails to demonstrate that this harm will be irreparable in the event the application for judicial review is allowed and Vidéotron must surrender its licences. In this regard, TELUS relies on the expert report of Dr. Christian Dippon, an economist, to argue that market conditions, including the distortion caused by Vidéotron's entry, are "path dependent" and cannot be reversed. According to Dr. Dippon, the low-cost services that Vidéotron is expected to offer will permanently alter consumer expectations. In other words, as he stated in cross-examination, the demand curve will be shifted irrevocably. Thus, even if Vidéotron's licences were cancelled following a judgment allowing the present application for judicial review, the competitive conditions could not be returned to what they currently are and TELUS will suffer a permanent drop in revenues.

[70] I do not accept Dr. Dippon's theory, because it is largely based on speculation and the examples he offers do not adequately support his reasoning.

[71] Dr. Dippon does not explain satisfactorily how the concept of path dependency applies to the Canadian market for mobile phone services. He does not rely on peer-reviewed research results to make this connection. While he references a paper about path dependency written by economist and Nobel prize winner Kenneth Arrow, the paper makes the argument that path

dependency is explained by the relative immobility of capital investment, not by changes in consumer behaviour or expectations.

[72] Dr. Dippon uses the example of Napster to illustrate his argument. The fact that this music sharing service operated for about two years before being closed down by court order would have caused an irreversible decline in the market for compact discs. Yet, Dr. Dippon does not rely on peer-reviewed research to support his example, but rather on two newspaper articles that do not refer to the concept of path dependency. Moreover, when one reads the articles, the general impression is that advances in technology, not the advent of Napster, made the decline of the compact disc inevitable.

[73] Dr. Dippon gives only one concrete example pertaining to the Canadian mobile phone services market: data roll-over plans, which allow customers to apply unused data towards their data available in subsequent months. Currently, mobile services providers in Western Canada do not offer data roll-over. Vidéotron, however, does so in Quebec. Thus, if it were to offer this service in Western Canada, TELUS and other carriers would have to follow suit, and consumers in this region would become accustomed to this option. Dr. Dippon then asserts that if Vidéotron had to exit the market, upon the judicial review being allowed, consumers would still demand data roll-over and the competitive conditions existing before Vidéotron's entry could never be restored.

[74] While I understand the economic theory behind this example, there is no evidence that things would unfold this way. There are simply too many links in the causal chain for me to

accept this kind of abstract reasoning as proof of irreparable harm. In practical terms, I fail to see why existing operators would not wait until the judicial review is concluded before offering data roll-over plans or why they could not stop offering them if they had followed Vidéotron's hypothetical move. Dr. Dippon's assertions are largely speculative.

[75] More fundamentally, Dr. Dippon's argument is based on the assumption that the market is currently competitive. This, indeed, is the opinion he conveyed in expert reports he authored on behalf of TELUS for ISED's consultation regarding the 3500 MHz spectrum auction and for the CRTC's consultation regarding the MVNO policy. He strongly disagrees that the spectrum set-asides and the MVNO policy are required to ensure greater competition in the Canadian mobile phone services market. However, both ISED and the CRTC concluded otherwise and implemented these measures, which are intended to bring about the kind of shift in market conditions that Dr. Dippon characterizes as a distortion. It is difficult to accept an expert opinion based on premises that were rejected when designing the policy that underlies the present matter.

[76] TELUS invokes two unreported orders made by Justices Richard Boivin and Yves de Montigny of the Federal Court of Appeal in *Bragg Communications Inc v British Columbia Broadband Association* (file 19-A-58). These orders stayed a CRTC decision on the basis that it "could result in a permanent market distortion." While TELUS provided me with the notice of motion that gave rise to one of these orders, I have little information as to the nature of the alleged market distortion and the evidence put before the Court on this topic. The short reasons given do not allow me to draw a meaningful comparison with the instant case. In the end, each case must be decided on the basis of its own facts.

[77] In sum, TELUS has not shown that the effects of Vidéotron's entry into the Western Canadian market for mobile phone services will be irreversible.

(c) *Adequacy of Damages*

[78] The usual manner of assessing the irreparable nature of the harm alleged by the plaintiff is to inquire as to whether an award of damages can adequately compensate that harm.

[79] This issue must be decided according to the facts of each case and the precise nature of the claim. Nevertheless, the general tendency in the Federal Courts is to consider that damages can adequately compensate lost sales or a loss of market share. Examples from the pharmaceutical industry include *Cutter Ltd v Baxter Travenol Laboratories of Canada, Ltd* (1980), 47 CPR (2d) 53 (FCA); and *The Regents of University of California v I-Med Pharma Inc*, 2016 FC 606, aff'd sub nom *Tearlab Corporation v I-Med Pharma Inc*, 2017 FCA 8. The same idea was applied in the telecommunications context in *Telus Integrated Communications v Canada (Attorney General)*, 2000 CanLII 16221 at paragraph 31.

[80] In this regard, TELUS relies on the evidence of Dr. Dippon, who says that it will be impossible to quantify TELUS's damages, because "no data exist that would allow forecasting the long-term impact of Vidéotron's usage of the 3500 MHz spectrum on TELUS and the overall market." Dr. Dippon appears to be saying that TELUS's future damages cannot be forecasted with precision now, because the effects of Vidéotron's entry in the market are yet unknown. This, however, is not the relevant question. Rather, the issue is whether the damages caused by

such entry, once it occurs, can be quantified. Dr. Dippon does not express an opinion with respect to this precise question.

[81] Thus, I am not convinced that it will be impossible to assess TELUS's damages, if need be. Such an exercise always involves a comparison with a hypothetical world in which the unlawful conduct did not take place. By its own nature, this exercise involves a certain degree of approximation. Nonetheless, it is routinely done in intellectual property cases. There is no insuperable obstacle preventing the application of this method in the present case.

[82] I am mindful that Dr. Dippon's theory is based on damages not only for lost sales, but also for a reduction of the price of TELUS's remaining sales. The parties have not made submissions as to whether such prejudice is compensable, where the current price levels do not result from a statutory monopoly, such as a patent. For the purposes of the analysis, I will assume without deciding that damages are available in these circumstances. Nevertheless, there is nothing in Dr. Dippon's evidence that explains why the decrease in prices following Vidéotron's entry in the market would not be measurable.

[83] TELUS also argues that it cannot claim damages from the Crown for things done pursuant to statutory powers. It is difficult to assess this submission in the absence of an actual action in damages brought by TELUS. It can nevertheless be observed that the Supreme Court of Canada dealt with a jurisdictional question arising in the context of a similar claim in *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62, [2010] 3 SCR 585 [*TeleZone*]. Although the Court did not rule on the merits of the claim, it suggested that TeleZone, an unsuccessful

participant in what appears to be an early form of spectrum auction, could have a claim in breach of contract. At paragraph 83, the Court stated: “A decision that is lawful in the sense that it had statutory authority may still constitute a breach of contract.”

[84] There is nothing in *Paradis Honey Ltd v Canada*, 2015 FCA 89, [2016] 1 FCR 446, that supports TELUS’s contention that it will be unable to claim damages. I emphasize that in that case, the Federal Court of Appeal dismissed a motion to strike a claim in damages against the Crown. The excerpts cited by TELUS form part of a discussion of a novel remedy of public law damages, which was recently disapproved by the Supreme Court of Canada: *Nelson (City) v Marchi*, 2021 SCC 41 at paragraphs 40-41 [*Marchi*]. They do not detract from TELUS’s ability to put forward a claim in breach of contract, as in *TeleZone*. To the extent that TELUS might want to pursue a claim in tort, it is far from certain that the Crown could oppose a “policy bar,” as it did in *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45; see also *Marchi*, at paragraphs 50-59.

(d) *Timing of Vidéotron’s Entry Into the Market*

[85] At the hearing, the parties devoted considerable attention to the issue of how and when Vidéotron could enter the market if no injunction is granted. This is because Vidéotron argued that it could not realistically enter the market and offer mobile phone services to consumers in Western Canada before several months. Thus, any irreparable harm that TELUS would suffer would not materialize before then, and the application for judicial review could be expedited to secure an earlier decision: see, by analogy, *Skibsted*, at paragraph 60.

[86] Given my earlier conclusions about irreparable harm, I need not place much reliance on this issue. Nevertheless, I am not persuaded that Vidéotron will be unable to use its licences and enter the market before the application is decided.

[87] It seems reasonably clear that Vidéotron cannot build its own network in Western Canada in a matter of months. It needs to access the network of one of the national carriers. This can occur in one of two ways. First, Vidéotron may conclude an MVNO agreement, either pursuant to a CRTC policy requiring national carriers to enter into such agreements, or on a voluntary basis. Second, Vidéotron may conclude a network sharing agreement, whereby a national carrier would give access to its network in exchange for access to Vidéotron's new licences. In each case, there is significant uncertainty as to the time needed to negotiate an agreement and, in the case of a MVNO mandated under the CRTC's policy, as to the time necessary to complete various steps of the regulatory process.

[88] Thus, there is no guarantee that Vidéotron will not launch its service before the application for judicial review is decided, especially if this takes several months, or even a year. Nevertheless, the issue is not determinative, because I have concluded that TELUS will not suffer irreparable harm if the injunction is denied.

[89] Vidéotron, however, suggests that the application be expedited. In response to a question I asked at the hearing, it also gave an undertaking not to sign up clients pursuant to an MNVO agreement mandated by the CRTC before January 31, 2022. It is unclear whether this undertaking also covers a voluntary MVNO agreement or a network sharing agreement. It is also

unlikely that expediting the application would result in a decision being made before that date. Hence, Vidéotron's undertaking does not alter my assessment.

(e) *Harm to Consumers and the Public Interest*

[90] TELUS alleges various forms of harm to consumers or the more general public interest. It alleges, for example, that consumers would suffer unrecoverable switching costs if Vidéotron were to enter the market, only to exit a few months later. It also alleges that Vidéotron's competition will reduce its profit margin, with the result that it will have less capital to invest in the development of its 5G network, which is not in the public interest. However, in *Air Passenger Rights v Canada (Transportation Agency)*, 2020 FCA 92 at paragraph 30, the Federal Court of Appeal stated that at the second step of the *RJR* test, "only harm suffered by the party seeking the injunction will qualify;" see also *Glooscap*, at paragraph 33. It can be properly considered only at the third step, the balance of convenience.

(3) Conclusion Regarding Irreparable Harm

[91] To summarize, the harm alleged by TELUS would result essentially from ISED's decision to set-aside a portion of the spectrum for regional carriers. It would arise even if other carriers had won the disputed licences instead of Vidéotron. Thus, there is no causal link between the alleged unlawful conduct and the harm. In reality, what TELUS describes as a market distortion is the intended effect of ISED's policy decision. Moreover, TELUS's evidence fails to convince me that the alleged harm is irreversible or could not be compensated in damages. Thus, TELUS has not proven irreparable harm.

C. *Balance of Convenience*

[92] As the first and second parts of the *RJR* test are not met, it is not strictly necessary to assess the balance of convenience. Nevertheless, I will comment briefly on the issue.

[93] Typically, assessing the balance of convenience begins with a comparison of the harm suffered by the plaintiff if the injunction is denied but the plaintiff prevails on the merits and the harm suffered by the defendant in the opposite hypothesis. In this case, the harm conceptually stems from the same source: the clientele that Vidéotron will draw away from TELUS. In TELUS's case, this is an actual loss. In Vidéotron's case, the loss is the opportunity to gain this clientele if the licences are withheld. As I indicated earlier, it is possible to quantify TELUS's loss, and the same would be true of Vidéotron's. TELUS, however, also claims that Vidéotron's entry would entail a reduction in the profit made on its remaining sales. There is no corresponding loss to Vidéotron in the opposite scenario. Thus, assuming the latter kind of loss is compensable, it may be that TELUS stands to lose more than Vidéotron.

[94] There are, however, two factors that would weigh heavily in favour of denying the injunction: the strength of TELUS's case and the public interest. I will discuss each in turn.

(1) Strength of TELUS's case

[95] Where the judge can easily assess the strength of the applicant's case, that strength may be factored in the balance of convenience: *Monsanto*, at paragraphs 50 and 115; *Vancouver Aquarium*, at paragraph 94; *Unilin Beheer BV v Triforest Inc*, 2017 FC 76 at paragraph 108. As

Robert J. Sharpe writes in his leading textbook, *Injunctions and Specific Performance*, Toronto, Thomson Reuters, looseleaf ed., at paragraph 2.160:

> It seems incontrovertible that the plaintiff's chance of ultimate success is directly relevant to an assessment of the relative risks of harm. The likelihood of the plaintiff's success or failure relates both to the extent of the risk that there will be any legal harm which calls for a remedy in favour of the plaintiff, and to the extent of the risk that an injunction may prevent the defendant from pursuing a rightful course of conduct. Surely all other considerations equal, a plaintiff who has a 75% chance of success has a stronger claim to interlocutory relief than a plaintiff who only has a 25% chance of success.

[96] If things could be measured with mathematical precision, the balance of convenience could be expressed by the following equation. An interlocutory injunction will issue if

$$H_p\, p \geq H_d\, (1 - p)$$

where H_p is the harm to the plaintiff if the injunction is withheld but the plaintiff prevails at trial, H_d is the harm to the defendant if the injunction issues but the defendant prevails at trial, and p is the plaintiff's chances of success on the merits.

[97] I have already explained why I find that TELUS's case does not raise a serious issue. Even if I were in error, TELUS's case would nonetheless be fairly weak. Thus, when the strength of the case is factored in, TELUS's potentially greater harm would be substantially reduced and thus weigh less than Vidéotron's potential loss. In the equation above, TELUS's low probability of winning would reduce the value of the left side of the equation and increase the value of the right side. In other words, the weakness of TELUS's case more than counterbalances any greater harm that TELUS might be exposed to.

(2) The Public Interest

[98] When assessing the balance of convenience, courts may consider the public interest: *RJR*, at 344. While both parties may raise public interest considerations, public authorities will usually be presumed to act in the public interest: *RJR*, at 346. In the *RJR* case itself, this factor was decisive. Even though the court had found that the tobacco companies had raised a serious issue regarding the constitutional validity of cigarette packaging regulations and shown that they would suffer irreparable harm, the Supreme Court denied the injunction they were seeking because the public interest in reducing the incidence of smoking was a paramount factor: *RJR*, at 352-354.

[99] In enacting section 7 of the *Telecommunications Act* (to which section 5(1.1) of the *Radiocommunication Act* refers), Parliament has indicated that the public interest with respect to telecommunications includes the following objectives:

(b) to render reliable and affordable telecommunications services of high quality accessible to Canadians in both urban and rural areas in all regions of Canada;	**b)** permettre l'accès aux Canadiens dans toutes les régions — rurales ou urbaines — du Canada à des services de télécommunication sûrs, abordables et de qualité;
(c) to enhance the efficiency and competitiveness, at the national and international levels, of Canadian telecommunications;	**c)** accroître l'efficacité et la compétitivité, sur les plans national et international, des télécommunications canadiennes;

[100] Realizing these objectives may require a form of arbitration between competing visions of the means necessary to achieve them. It is for Parliament, or those to whom Parliament

delegates its powers, to decide what is in the public interest and how to achieve it. In this particular case, this mission was conferred upon the Minister or the CRTC, depending on which aspect of the regulation of telecommunications is involved.

[101] The CRTC and the Minister both found that the market for mobile phone services is not competitive, that the national carriers exercise market power and that it is desirable to implement measures aimed at fostering greater competition. I must presume that the implementation of these measures is in the public interest.

[102] More specifically, it is in the public interest to facilitate the entry of new providers in the Western Canadian market for mobile phone services. Thus, granting the stay TELUS requests would be against the public interest. It would deprive the policy underlying the set-aside spectrum of a significant portion of its intended effect. It would deprive consumers of the benefit of increased competition.

[103] Against this, TELUS puts forward its own vision of the public interest. Exposing consumers to the possibility of subscribing to Vidéotron's service, only to be forced to incur the costs and inconvenience of switching again should Vidéotron's licences be cancelled, would be against the public interest. The decrease in prices resulting from Vidéotron's entry into the market would reduce TELUS's profits and, hence, the resources it could invest in expanding its network. That too would be against the public interest. Lastly, the implicit theme that runs through TELUS's argument is that the $1.1 billion "unfair discount" afforded to Vidéotron, and the resulting market distortion, are also contrary to the public interest.

[104] These submissions, however, amount to a challenge to the wisdom of the manner in which the Minister is implementing Parliament's mandate to ensure competitiveness and affordability. The Supreme Court warned against the dangers of embarking on such an exercise in *RJR*, at 346:

> A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest.

[105] Thus, for example, there may be a tension between the public interest in lowering prices and the public interest in developing the mobile phone network. When a market is not competitive, there is likely to be a tension between market freedom and pro-competitive measures. Arbitrating between these competing interests is a matter for the Minister. A motion for a stay is not the proper forum to challenge the Minister's choices.

[106] As regards the inconvenience for consumers, while it is true that certain consumers will suffer inconvenience if the stay is not granted and the application for judicial review is allowed, all consumers in Western Canada will not benefit from increased competition if the injunction is granted.

[107] Again, a parallel may be drawn with the facts of *RJR*. The tobacco manufacturers asserted that the immediate application of the new cigarette packaging regulations would impose additional costs on them, which they might pass on to smokers in the form of price increases.

The Supreme Court gave little weight to this potential impact on smokers. Instead, the determinative factor was the longstanding public interest in reducing the incidence of smoking.

[108] Thus, if it were necessary to consider the balance of convenience, the public interest would tip the scales in favour of denying the stay sought by TELUS.

[109] All things considered, I conclude that it is just and equitable to deny the stay and to allow ISED to issue the impugned licences.

III. Disposition

[110] As none of the three parts of the *RJR* test is satisfied, TELUS's motion for a stay will be dismissed with costs.

[111] Vidéotron asks for an order that the application be expedited. The application, however, is under special management. The case management judge is in a much better position than I am to decide whether the usual timelines should be abridged and to set a more compressed schedule. I will leave it to the case management judge to decide whether the matter should be expedited and to make any necessary orders in this regard.

ORDER in T-1335-21

THIS COURT ORDERS that the applicant's motion for a stay of the issuance of licences to the respondent Vidéotron is dismissed with costs.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 19, 2021
ORDER AND REASONS:	GRAMMOND J.
DATED:	OCTOBER 22, 2021

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