

Federal Court



Cour fédérale

**Date: 20260108**

**Docket: T-2015-22**

**Citation: 2026 FC 16**

**Ottawa, Ontario, January 8, 2026**

**PRESENT: The Honourable Mr. Justice Fothergill**

**BETWEEN:**

**X-SPECTRUM 2 INC., FORMERLY KNOWN  
AS XPLORE MOBILE INC.**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] The Applicant X-Spectrum 2 Inc, formerly known as Xplore Mobile Inc [Xplore], seeks judicial review of a decision made on behalf of the former Minister of Innovation, Science and Industry [Minister] by a delegated official with Innovation, Science and Economic Development Canada [ISED]. The delegated official refused a joint application by Xplore and TELUS

Communications Inc [TELUS] to transfer Xplore's low-band mobile spectrum licences in Manitoba to TELUS.

[2] For the reasons that follow, the decision to refuse the application to transfer Xplore's spectrum licences to TELUS was procedurally unfair and unreasonable. The application for judicial review is allowed.

## II. Background

[3] Radio frequency is used to facilitate mobile telecommunications by connecting cellular towers to mobile devices. Spectrum is divided into low-, mid-, and high-band frequencies. The low-band spectrum is commonly used for mobile telecommunications over large or densely populated geographic areas.

[4] A spectrum licence allows its holder to use specific frequencies to deliver mobile phone services in a prescribed area. A mobile service provider [MSP] acquires a spectrum licence through an ISED auction or by transfer from another MSP.

[5] The Minister is responsible for managing spectrum in Canada, and may grant, impose additional terms and conditions upon, or refuse licence transfer applications from MSPs. This decision is guided by policies, procedures, and broad discretionary powers to promote the orderly establishment and efficient operation of radiocommunications (*Radiocommunications Act*, RSC 1985, c R-2, s 5(1)). The Minister delegates some spectrum management responsibilities to ISED officials.

[6] On May 2, 2016, Bell Mobility Inc [Bell] acquired Manitoba Telecom Services. As a condition of regulatory approval of the merger, Bell agreed to transfer five spectrum licences – four mid-band and one low-band – to Xplornet Communications Inc, Xplore’s former affiliate.

[7] In November 2018, Xplore launched as an MSP in Manitoba. It was the fourth largest in the province. Nevertheless, it struggled to become viable.

[8] Around November 2021, Xplore began the process of winding up its Manitoba operations. An advisory firm conducted a solicitation process to facilitate the sale of Xplore’s business and assets. It alerted every MSP and prospective MSP that Xplore’s spectrum was available for transfer.

[9] Vidéotron Ltd [Vidéotron], a subsidiary of Québecor Inc [Québecor], expressed interest in acquiring Xplore’s spectrum and submitted an offer. The offer was deemed uncompetitive and was eventually withdrawn. TELUS made an offer that was acceptable to Xplore.

[10] On July 14, 2022, Christine Prudham, a representative of Xplore, telephoned Eric Dagenais, Senior Assistant Deputy Minister, Spectrum and Telecommunications, ISED. Ms. Prudham informed Mr. Dagenais that Xplore would cease operations in August 2022 and intended to seek ISED’s approval to transfer its spectrum licences to TELUS. Mr. Dagenais urged Ms. Prudham to contact Vidéotron about a transfer to that company instead.

[11] Later that day, Xplore and TELUS submitted a joint application to ISED seeking regulatory approval to transfer Xplore’s Manitoba spectrum licences to TELUS [Licence

Transfer Application]. They requested a decision by August 31, 2022, approximately six weeks later.

[12] On July 15, 2022, a representative of Québecor telephoned Ms. Prudham and expressed interest in acquiring Xplore's spectrum licences. Ms. Prudham told the representative that Vidéotron had previously indicated it was not interested in acquiring the licences. The Québecor representative subsequently confirmed that Vidéotron would not seek to acquire the licences.

[13] On July 22, 2022, Pierre Karl Péladeau, Chief Executive Officer of Québecor, sent a letter to the Minister urging him to refuse the Licence Transfer Application and facilitate the transfer of the spectrum to Vidéotron. On August 5, 2022, Susan Hart, Director General, Spectrum Management, ISED, acknowledged receipt of the letter and reaffirmed the government's commitment to fostering competition in the telecommunications sector. ISED did not inform Xplore of Mr. Péladeau's correspondence.

[14] By early August 2022, ISED had completed a preliminary assessment of the Licence Transfer Application and had identified concerns about the proposed concentration of spectrum in the hands of one of the "Big Three" national mobile service providers [NMSPs]: namely Bell, Rogers Wireless [Rogers] and TELUS. If approved, the Licence Transfer Application would increase the concentration of low-band spectrum under the control of the NMSPs in Manitoba from 78.72% to 84.04%, leaving only 15.96% for non-NMSPs (also referred to as "Fourth Players").

[15] On August 4, 2022, Mr. Dagenenais sent an e-mail message to Simon Kennedy, Deputy Minister of ISED, in which he stated the following:

As previously discussed, Xplore Mobile is ceasing operations after five years of service in Manitoba, and ISED has received a request to transfer all of its commercial mobile spectrum licences (a total of 40 MHz in the 700 MHz, AWS-1 and BRS 2500 MHz bands) to TELUS.

Our review of the proposed transfer against the Spectrum Licence Transfer Framework raises significant concerns about the resulting concentration of spectrum that would be held by Canada's three national mobile service providers in Manitoba. Moreover, the exit of Xplore Mobile from the market will leave the province without any regional competition for national mobile service providers, and the proposed transfer, if approved, would reinforce this shift in the competitive landscape.

As the delegated decision-making authority on spectrum licence transfers, I am proposing not to allow the transfer to proceed. [The Minister's Office] has been made aware. As the next step, my team will advise the parties confidentially of the concerns raised by their request. This likely will be done in the next couple of days, depending on availability.

As you may be aware, Québecor has sent a letter to the Minister on this topic (dated July 22, 2022) opposing the transfer of these licences to any of the national mobile service providers. Since we treat each spectrum licence transfer application on its own merit, this letter had no influence on our decision regarding this application.

[16] Mr. Kennedy sought assurances from Mr. Dagenais that the Minister and his staff were aware of the pending decision, "given all the heat around spectrum and telecom these days". A proposed merger between Rogers and Shaw Communications Inc [Rogers-Shaw Merger] was announced in March 2021, but was opposed by the Competition Bureau. The matter was litigated before the Competition Tribunal and Federal Court of Appeal.

[17] ISED officials met with representatives of Xplore and TELUS on August 10, 2022. ISED conveyed its concerns regarding the concentration of spectrum among NMSPs that would result from the proposed licence transfer, and the impact on non-NMSP competitors. ISED presented Xplore and TELUS with three options: (1) ISED could continue to review the Licence Transfer Application and make a decision; (2) Xplore and TELUS could withdraw the application and submit a new one; or (3) Xplore could return the spectrum licences to ISED. Xplore and TELUS chose the first option and provided supplementary written submissions on August 17, 2022.

[18] On August 22, 2022, Ms. Prudham spoke with a senior policy advisor in the Minister's Office, who again asked her to contact Vidéotron about a possible transfer of the licences to that company. Ms. Prudham expressed frustration with ISED's repeated insistence that the spectrum be transferred to Vidéotron, despite the company's lack of interest.

[19] On September 1, 2022, ISED refused the Licence Transfer Application.

[20] On January 25, 2023, Vidéotron acquired two additional low-band spectrum licences in Manitoba through an ISED auction. On March 31, 2023, the Minister announced his approval of the Rogers-Shaw Merger on the condition that Shaw transfer its spectrum licences held by Freedom Mobile Inc to Vidéotron, and Vidéotron expand its services outside Québec, including in Manitoba.

[21] On June 2, 2023, at ISED's invitation, Xplore and TELUS reapplied for approval to transfer the mid-band spectrum licences. On July 26, 2023, ISED approved the mid-band spectrum transfer to TELUS. Only the low-band spectrum licence transfer remains in dispute.

### III. Decision under Review

[22] By letter dated September 1, 2022, Ms. Hart notified Xplore and TELUS that the Licence Transfer Application was refused for the following reasons:

The proposed transfer raised substantial concerns that, over the longer term, the resulting concentration of spectrum would impede if not altogether preclude a future competitor from providing services and competing effectively with national mobile service providers (NMSPs) in the province. As such, it would be contrary to ISED's policy objective for spectrum management:

*To maximize the economic and social benefits that Canadians derive from the use of the radio frequency spectrum resource, including the efficiency and competitiveness of the Canadian telecommunications industry, and the availability and quality of services to consumers.*

ISED is cognizant that refusing the transfer leaves the spectrum temporarily unused in service to Canadians in Manitoba. The policy objective for spectrum management, however, is best served when ISED helps ensure that existing and future competitors have access to sufficient spectrum to provide services and compete effectively with NMSPs over the longer term.

### IV. Issues

[23] This application for judicial review raises the following issues:

- A. Was ISED's decision procedurally fair?
- B. Was ISED's decision reasonable?

V. Analysis

A. *Was ISED's decision procedurally fair?*

[24] Procedural fairness is subject to a reviewing exercise best reflected in the correctness standard, although strictly speaking no standard of review is being applied. The Court must examine the process followed by the decision maker and determine whether the procedure was fair having regard to all of the circumstances (*Jagadeesh v Canadian Imperial Bank of Commerce*, 2024 FCA 172 at para 53; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 44-56).

[25] The level of procedural fairness owed to Xplore was at the low end of the spectrum (*Telus Communications Inc v Vidéotron Ltée*, 2022 FC 726 at para 91; *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 [*Baker*] at paras 22-25). Despite the significant commercial interests of Xplore, the decision did not engage fundamental rights. Nor did the nature of the process closely resemble a judicial one (*Baker* at para 23). Furthermore, the underlying statutory scheme empowered the Minister to prescribe the process to be followed (*Baker* at para 27).

[26] Xplore argues that the process was unfair for three reasons: (1) the Minister's delegate applied an undisclosed "20% Guide" to assess whether the Licence Transfer Application would leave sufficient low-band spectrum available for Fourth Players; (2) ISED officials approached the Licence Transfer Application with a closed mind; and (3) ISED improperly failed to disclose the letter from Mr. Péladeau, and exhibited a bias in favour of Vidéotron throughout the process.

## (1) The 20% Guide

[27] The letter from Ms. Hart that communicated ISED’s decision to Xplore did not mention a 20% Guide for determining the minimum proportion of spectrum that must be reserved for Fourth Players. However, the 20% Guide figured prominently in the advice memorandum prepared for Mr. Dagenais in his capacity as the delegated decision maker.

[28] The advice memorandum, which included a “framework analysis” as an annex, forms a part of the decision under review (*Virgen v Canada (Attorney General)*, 2022 FC 1544 at para 46, citing *Saber & Sone Group v Canada (National Revenue)*, 2014 FC 1119 at para 23; *Sketchley v Canada (Attorney General) (FCA)*, 2005 FCA 404 at para 37). The framework analysis provided the following “background” to factor (b), one of the mandatory considerations prescribed by s 5.6.4 of ISED’s Licensing Procedure for Spectrum Licences for Terrestrial Services (October 2015), also known as the Client Procedures Circular [CPC]:

**(b) the overall distribution of licence holdings in the licensed spectrum band and commercial mobile spectrum bands in the licence areas:**

Background to the present factor:

The CPC does not “cap” any licence holder’s, including any NMSP’s, total primary spectrum holdings which may result from a proposed transfer. However, a proposed transfer raises what ISED refers to as “concentration concerns” if it would result in the following in a given licence area:

- Only **20 percent** or less of all commercial mobile spectrum, or of all low-band or all mid-band spectrum, in the control of non-NMSPs (the “20-percent guide”); or
- **40 percent** or more of all spectrum, or of all low-band or all mid-band spectrum, in the control of a single NMSP (the “40-percent guide”).

These guides, in combination with the other factors, help inform ISED's assessment of the significance of changes in spectrum concentration.

The 20-percent guide reflects the following considerations:

- ISED has a longstanding policy of encouraging competition for NMSPs in the commercial mobile sector by implementing pro-competitive auction measures:
  - Set-asides: Of the 918 MHz of spectrum currently allocated for commercial mobile use (among other uses), a total of 150 MHz (or 16.34 percent) has been set-aside for non-NMSPs.
  - Aggregation limits: As a result of ISED's spectrum caps, non-NMSPs have acquired at auction:
    - 10 MHz (or **14.71 percent**) of spectrum in the MBS 700 MHz band; and
    - 40 MHz (or **21.05 percent**) of spectrum in the BRS2500 MHz band in many areas.
- The spectrum currently held by smaller players as a result of ISED's competitive measures is divided between multiple smaller network operators in almost all service areas.
- ISED's spectrum data shows that non-NMSPs who compete effectively with NMSPs in the commercial mobile market will typically hold about 10 percent or more of the spectrum available.
- In some areas, much of the commercial mobile spectrum not in the hands of NMSPs is held by operators that use the spectrum to offer other wireless services, such as fixed wireless access (FWA) service.
- At any given time, about 1 percent of the commercial mobile spectrum available may be temporarily in ISED's control for various technical or procedural reasons.

Ultimately, therefore, if only 20 percent or less of commercial mobile spectrum is controlled by non-NMSPs, there is a risk that no smaller commercial mobile service provider would have enough spectrum to provide adequate service, and competition may be impeded as a result.

The “40-percent guide” for individual NMSPs is applicable mainly in larger wireless markets and other areas that are populous enough to support three-way competition among NMSPs. In some rural or remote areas, it may be reasonable for an NMSP to hold a larger share of the spectrum available.

[Emphasis original]

[29] In the first Direction to Attend a cross examination issued to Marc-André Rochon, the author of the framework analysis and the Minister’s affiant in this application, Xplore requested that he produce “[a]ll documents, data, and other records and material considered by ISED in developing the ‘40-percent guide’ and the ‘20-percent guide’ referred to in [his] affidavit at paras. 42-45”. By letter dated January 23, 2023, counsel for the Attorney General of Canada responded: “We have nothing to produce on this matter”.

[30] Xplore argues that it should have been informed of the 20% Guide before the decision was made, and given an opportunity to respond (citing *Wamahoro v Canada (Citizenship and Immigration)*, 2015 FC 889 at paras 23-28). In *Canada v Kabul Farms Inc*, 2016 FCA 143 [*Kabul Farms*], the Federal Court of Appeal (*per* Stratas JA) said the following about a decision maker’s reliance on an unpublished guideline or formula to determine the “base amounts” to be applied to an assessment (at para 44):

My second serious concern about the Director’s apparent use of an unpublished formula is procedural fairness. In a case such as this—the potential imposition of a monetary penalty against a party for a regulatory violation—the party has a right to know the case to meet and to make informed submissions on it: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193. In this case, the Director is aware of the obligation to some extent: he afforded the respondent an opportunity to respond to many aspects of the case against him. But the apparent existence and non-disclosure here of an

unpublished formula and perhaps more—material counsel for the appellant advises was relied upon by the Director to select the base amounts—worked unfairness to the respondent.

[31] As an aspect of procedural fairness, a party must be apprised of any formula, guideline or supporting analysis the decision maker will rely upon in assessing the matter before him. In response, “that party is entitled to suggest that any formula, guideline or supporting analysis is wrong, inappropriate, unacceptable or indefensible on the facts, or inconsistent with legislative provisions supplying decision-making criteria” (*Kabul Farms* at para 44). In this case, the decision maker’s reliance on the 20% Guide was withheld from Xplore, leaving the company “in the dark”.

[32] Mr. Rochon confirmed in cross-examination that the 20% Guide is not mentioned in the CPC. Instead, he volunteered the statement in s 5.6.4.2 of the CPC that “[i]n each case, Industry Canada will examine the ability of the applicants and other existing and future competitors to provide services, given the post-transfer concentration of commercial mobile spectrum in the affected licence areas”. Mr. Rochon’s cross-examination included the following question and answer:

Q. Indeed, in no documents available to the industry as a whole, or in particular to Xplore group, is the 20 percent test set forth. Fair?

A. There are no specific documents available saying that there is a 20 percent guide.

[33] According to the Minister, the 20% and 40% Guides are intended to assist ISED officials in their assessment of concentration levels and the identification of concerns warranting further consideration. In the words of Mr. Rochon, “[t]hey are not to be viewed as hard and fast rules”.

The spectrum concentration calculation, which is integrated in factors (a) and (b) of s. 5.6.4 of the CPC, is only one aspect of the overall analysis. It is assessed against all other factors set out in the CPC, including regional specificities and any other considerations that may be relevant in a particular case.

[34] The Minister says that the 20% Guide was not used as a threshold upon which the Licence Transfer Application was decided. However, if the Application were to be approved, then the spectrum available to non-NMSPs would be only 15.96%. This gave rise to a preliminary concern regarding concentration that was duly communicated to Xplore.

[35] The Minister emphasizes the statements contained in the framework analysis annexed to the advice memorandum confirming that the CPC “does not ‘cap’ any licence holder’s, including any NMSP’s, total primary spectrum holdings which may result from a proposed transfer”; and “[the 20% and 40%] guides, in combination with the other factors, help inform ISED’s assessment of the significance of changes in spectrum concentration.”

[36] While the duty of procedural fairness owed in this case was at the low end of the spectrum, this is not to say that it was non-existent (*Kozul v Canada (Employment and Social Development)*, 2016 FC 1316 at para 10). The question is whether considerations that were potentially crucial to the decision had been used to support it without providing an opportunity to the affected party to respond or comment (*Yang v Canada (Citizenship and Immigration)*, 2013 FC 20 at para 17).

[37] Not surprisingly, the supplemental submissions made by Xplore and TELUS on August 17, 2022 did not address the application of the 20% Guide. They were, however, responsive to the issues raised by ISED in its discussion with the applicants on August 10, 2022, and in correspondence from ISED dated August 11, 2022, namely:

- (a) the change in spectrum concentration levels among national mobile service providers (NMSPs), particularly at low-band, that would result from the transfer; and
- (b) the ability of other existing and future competitors to provide services, given the post-transfer concentration of commercial mobile spectrum.

[38] The supplemental submissions noted that, even with an increase to 46 MHz of low-band spectrum, TELUS would continue to operate with less than half the low-band spectrum holdings of Bell and Rogers. The supplemental submissions continued (at para 12):

While the NMSPs would hold slightly more low-band spectrum in Manitoba than in other regions, this is not inappropriate given that there are only three operational mobile carriers in Manitoba to provide service to Manitobans. By preventing this transfer, ISED is effectively taking 10 MHz out of service, and removing spectrum that is currently allocated to serve Manitobans. When combined with the 20 MHz of 600 MHz spectrum that went unsold in the last auction, there is 30 MHz of low-band spectrum sitting fallow and not in use for Canadians. Manitoba would be the only province in Canada with 15% of low-band spectrum unused.

[39] Xplore and TELUS asserted that approving the Licence Transfer Application would not harm the ability of future competitors to provide service to Manitobans (at para 22):

To operate a mobile service requires 10 MHz to 20 MHz of low-band spectrum. This was demonstrated by XMI, which was operating with 10 MHz. Similarly, Eastlink, Bell and TELUS successfully operate with only 10 MHz of low-band spectrum in

various parts of the country. Shaw, which has done very well in Southern Ontario, has 20 MHz of low-band spectrum in that region. Consequently, having more than 20 MHz available for an existing or new entrant is demonstrably unnecessary, particularly in Manitoba, which has a lower population density than the national average.

[40] Xplore and TELUS noted that on August 5, 2022, ISED issued the Notice of Upcoming Auction of Residual Spectrum Licences, SPB-004-22, which would result in the availability of 20 MHz of spectrum in the 600 MHz band as of January 2023. Those licences would be subject to a set-aside provision to prevent any NMSP from acquiring the spectrum. As a result, the concentration of low-band spectrum available for deployment in the hands of the NMSPs would inevitably decrease in Manitoba following the auction. By any measure, there would be more than enough low-band spectrum readily available in the upcoming months to launch a new mobile service in Manitoba.

[41] None of these submissions were reflected in the advice memorandum provided to Mr. Dagenais. Rather, the evidence establishes that the 20% Guide was the primary consideration informing ISED's assessment of the Transfer Licence Application and its subsequent refusal. The framework analysis annexed to the advice memorandum, which was not provided to Xplore until it commenced this litigation, included a "concentration analysis" that began and ended with the 20% Guide.

[42] As will be seen in the discussion of reasonableness that follows, virtually every aspect of ISED's analysis referred to the "change in spectrum concentration" that would offend the 20%

Guide. I agree with Xplore that the unfairness resulting from the non-disclosure of the 20% Guide is obvious.

[43] The application of the 20% Guide was sufficiently determinative for ISED officials to inform the Minister of the anticipated refusal of the Licence Transfer Application even before their receipt and review of Xplore's supplemental submissions on August 17, 2022. This is what gives rise to Xplore's second challenge to the procedural fairness of the decision, namely that the decision maker approached the assessment of the Licence Transfer Application with a closed mind.

(2) Closed Mind

[44] Xplore says that the refusal of the Licence Transfer Application was predetermined, and the supplemental submissions dated August 17, 2022 were futile. According to Xplore, ISED officials were determined to facilitate the transfer of the spectrum to Vidéotron. Indeed, in March 2023, the Minister announced that Vidéotron would expand its services in Manitoba.

[45] The Minister responds that Xplore is barred from raising this argument for the first time on judicial review, as it failed to complain at the first opportunity (citing *Hennessey v Canada*, 2016 FCA 180 at para 20). In the alternative, the Minister insists that ISED officials maintained an open mind, even after Mr. Dagenais informed the Deputy Minister and Minister's office of the anticipated refusal of the Licence Transfer Application.

[46] In fact, Xplore did raise its concern with ISED officials about their evident preference for a transfer of the spectrum to Vidéotron (for example, during Ms. Prudham’s discussion with a senior policy advisor to the Minister, in which she expressed frustration about the repeated suggestion that Xplore pursue a transfer of the licences to Vidéotron). In any event, the chain of internal e-mail messages between August 4 to 8, 2022 was not disclosed to Xplore before this litigation was commenced.

[47] The legal test for determining whether a decision maker had a closed mind involves an enquiry into whether the decision was predetermined (*Shoan v Canada (Attorney General)*, 2016 FC 1003 at paras 46-47). I accept the Minister’s position that the internal exchange of e-mail messages between August 4 and 8, 2022 conveyed a preliminary assessment of the Licence Transfer Application, not a final decision. Mr. Dagenais informed the Deputy Minister that he was “proposing” to reject the application. In cross-examination, Mr. Dagenais confirmed under oath that “the final decision had not been made” at this time.

[48] Xplore and TELUS asked ISED officials to process the Licence Transfer Application within an accelerated timeframe, half of the usual period required. As Justice Pamel observed in *GCT Canada Limited Partnership v Vancouver Fraser Port Authority*, 2022 FC 1109 at para 83:

[...] a certain level of pre-judgment of decision makers is to be expected in certain circumstances, as long as it does not equate to intransigence—a closing of the mind to the point of no longer being able to be otherwise persuaded.

[49] Aside from its failure to disclose the 20% Guide in its discussion with Xplore and TELUS on August 10, 2022 and in its correspondence the following day, ISED was candid about

the nature of its concerns. ISED went so far as to warn the applicants that the Licence Transfer Application was unlikely to be approved, and gave them a number of options, including abandoning the application altogether. ISED officials had previously reviewed and considered the applicants' submissions regarding the proposed transfer, and they may not have expected that supplementary written submissions would be forthcoming.

[50] Xplore has not established that ISED officials approached the decision with a closed mind, or that the supplementary submissions dated August 17, 2022 were futile.

(3) Bias in Favour of Vidéotron

[51] ISED officials did not inform Xplore of the letter from the Chief Executive Officer of Québecor dated July 22, 2022 urging the Minister to refuse the Licence Transfer Application and facilitate transfer of the spectrum to Vidéotron. Xplore says that ISED was obliged to disclose all correspondence received from third parties regarding the matter under consideration, citing Justice Marshall Rothstein's brief oral decision in *Ponce de Leon v Canada (Minister of Citizenship and Immigration)* [*Ponce de Leon*], 1998 CanLII 8681 (FC), at paragraph 3:

The applicants say the panel is obliged to disclose how it received the anonymous letters and its failure to do so creates an apprehension of bias and unfairness. There is no evidence before me of impropriety with respect to the receipt of the letters. What is important for fairness is that the panel ensure the parties know that the anonymous letters were received and that they be disclosed to the parties. This was done in the present case. [...]

[Emphasis added]

[52] *Ponce de Leon* concerned a decision of the Immigration and Refugee Board to reject a refugee claim. Decisions made in that context attract a high level of procedural fairness. More generally, if decision makers receive information from third parties, this will not necessarily jeopardize parties' participatory rights: to know and to comment on material relevant to the decision; to have notice of the grounds on which the decision may be based; and to have an opportunity to make representations accordingly. The ultimate question for a reviewing court is whether, in all the circumstances (including respect for administrative procedural choices), the tribunal's decision-making procedure was essentially fair. This involves a contextual and fact-specific inquiry (*Re:Sound v Fitness Industry Council of Canada*, 2014 FCA 48 at para 54).

[53] The e-mail message from Mr. Dagenais to the Deputy Minister of ISED dated August 4, 2022, included the following statement:

As you may be aware, Québecor has sent a letter to the Minister on this topic (dated July 22, 2022) opposing the transfer of these licences to any of the national mobile service providers. Since we treat each spectrum licence transfer application on its own merit, this letter had no influence on our decision regarding this application.

[54] During his cross-examination, Mr. Rochon testified under oath that ISED did not make use of the correspondence from Mr. Péladeau in the decision-making process. Mr. Rochon did not regard the letter as relevant to the spectrum analysis he was conducting, and he did not discuss it with Mr. Dagenais. There is no reason to doubt the veracity of Mr. Rochon's testimony.

[55] Any similarities between the themes advanced in the letter from Québecor's Chief Executive Officer and ISED's rationale for rejecting the Licence Transfer Application are unsurprising and inconsequential. Other evidence of ISED's interest in facilitating a transfer of the spectrum to Vidéotron is similarly unremarkable. There were very few potential "Fourth Players" who might acquire the spectrum in furtherance of ISED's policy of fostering increased competition. The Rogers-Shaw merger and the Minister's subsequent announcement about Vidéotron expanding its services in Manitoba offer little to support Xplore's theory of a prevailing bias in favour of Vidéotron.

B. *Reasonableness*

[56] In light of my conclusion that ISED's failure to disclose the 20% Guide to Xplore rendered the decision to refuse the Licence Transfer Application procedurally unfair, it is not strictly necessary to consider the reasonableness of the decision. This may nevertheless have a bearing on the appropriate remedy.

[57] The merits of ISED's decision are subject to review by this Court against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at para 10). The Court will intervene only where "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

[58] The criteria of “justification, intelligibility and transparency” are met if the reasons allow the Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[59] The framework analysis annexed to the advice memorandum included commentary on each of the eight factors prescribed by s 5.6.4 the CPC, namely:

- a. the current licence holdings of the Applicants and their Affiliates in the licensed area;
- b. the overall distribution of licence holdings in the licensed spectrum band and commercial mobile spectrum bands in the licensed area;
- c. the current and/or prospective services to be provided and the technologies available using the licensed spectrum band;
- d. the availability of alternative spectrum that has similar properties to the licensed spectrum band;
- e. the relative utility (e.g. above and below 1 GHz) and substitutability of the licensed spectrum and other commercial mobile spectrum bands in the licensed area;
- f. the degree to which the Applicants and their Affiliates have deployed networks and the capacity of those networks;
- g. the characteristics of the region, including urban/rural status, population levels and density, or other factors that impact spectrum capacity or congestion; and
- h. any other factors relevant to the policy objective outlined in Section 5.6.4 that may arise from the Licence Transfer or the Prospective Transfer.

[60] The discussion of factor (b) – the overall distribution of licence holdings in the licensed spectrum band and commercial mobile spectrum bands in the licensed area – began with a

subheading titled “Background to the present factor”. This was the only factor to include a subheading with additional background information, and featured the undisclosed “20-percent guide” and “40-percent guide”. According to the analysis, “if approved, the transfer would increase the concentration of low-band spectrum held by NMSPs in Manitoba by 5.32 percent, to substantially more than 80 percent”.

[61] The discussion of factors (c), (d), (e) and (f) included some variation of the phrase “this factor magnifies the importance of the change in spectrum concentration under factor (b) that would result if the proposed transfer is approved”.

[62] The discussion of factor (g) – the characteristics of the region, including urban/rural status, population levels and density, or other factors that impact spectrum capacity or congestion – provided the most recent census results (2016) for the populations of the service areas covered by Xplore’s licences, specifically Manitoba, Winnipeg and Brandon. The analysis noted that Winnipeg contained a large population centre, but “[t]his finding neither magnifies nor diminishes the importance of the change in spectrum concentration that would result from the present request, and it does not have any specific implications for the post-transfer ability of competitors to provide services”.

[63] As previously discussed, the supplemental submissions made by Xplore and TELUS on August 17, 2022 explained why approving the Licence Transfer Application would not harm the ability of future competitors to provide service to Manitobans. The applicants estimated that the successful operation of a commercial mobile service would require 10 MHz to 20 MHz of low-band spectrum, and offered practical examples to illustrate the point. Xplore and TELUS argued

that it was demonstrably unnecessary to keep more than 20 MHz available for an existing or new entrant, particularly in Manitoba which has a lower population density than the national average. There is nothing to indicate that these arguments were considered by the decision maker.

[64] Xplore and TELUS noted that the Upcoming Auction of Residual Spectrum Licences would result in the availability of additional low-band spectrum, and those licences would be subject to a set-aside provision to prevent any NMSP from acquiring the spectrum. The framework analysis acknowledged that wireless carriers could seek to acquire additional low-band spectrum at the residual auction in 2023, when ISED would make available 20 MHz of spectrum in the 600 MHz band covering Manitoba. The framework analysis nevertheless concluded that “Xplore Mobile’s 10 MHz of low-band spectrum could [...] be vital for a new competitor, should one emerge, to offer service and compete effectively with NMSPs in Manitoba”. It is unclear how ISED officials reached this conclusion.

[65] The framework analysis ended with the following observations:

Although it has struggled to compete effectively against NMSPs since it entered the market in 2018, Xplore Mobile’s exit will leave Manitoba without any regional competitors in commercial mobile services – to this point, there are no other non-NMSPs currently active in the province who could acquire and deploy Xplore Mobile’s licences. The proposed transfer, therefore, if approved, would reinforce the decrease in competitive intensity and would be a departure, both perceived and real, from the government’s commitment to wireless competition in Canada.

ISED is cognizant that refusing the transfer would leave the spectrum temporarily unused in service to Canadians in Manitoba. The policy objective for spectrum management, however, is best served when ISED helps ensure that existing and future competitors have access to sufficient spectrum to provide services and compete effectively with NMSPs over the longer term.

[66] A decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it (*Vavilov* at para 128). Here, ISED did not meaningfully grapple with Xplore's and TELUS' submissions regarding the amount of low-band spectrum necessary to support a new entrant in the commercial mobile services market; the significance of the upcoming auction of residual spectrum licences; and the characteristics of the region, including urban/rural status, population levels and density. Instead, the framework analysis repeatedly invoked the undisclosed 20% Guide as justification for the decision, in preference to the more fact-based and nuanced arguments advanced by Xplore and TELUS.

[67] ISED's decision to reject the Licence Transfer Application was therefore unreasonable as well as procedurally unfair.

## VI. Remedy

[68] Xplore says this matter should not be remitted to the Minister for redetermination, because the outcome is inevitable (citing *Vavilov* at para 142). In the alternative, Xplore asks that the matter be remitted with the following additional guidance: (1) ISED cannot apply the 20% Guide, (2) ISED must consider current market forces, (3) ISED must account for the fact that there are no longer any competitive measures or conditions restricting the transfer of Xplore's licences to NMSPs, (4) ISED must consider recent changes in spectrum concentration, and (5) ISED must not discuss the application or disclose communications with third parties.

[69] In my view, the outcome of any redetermination of the Licence Transfer Application is not inevitable. The Court has not been apprised of the current state of mobile services concentration in Manitoba, and is not equipped to assess the technical, social and policy implications of transferring Xplore's low-band frequency to TELUS. Consistent with *Vavilov* (at para 141), the matter will be remitted to the Minister for redetermination in accordance with these reasons.

[70] The additional guidance proposed by Xplore is superfluous to the constraints already imposed upon the Minister and ISED by binding and publicly available policies and procedures. There is nothing inherently objectionable about ISED's use of a percentage guide to identify preliminary concerns about market concentration, provided that the existence of the guide is disclosed to applicants and they are given an opportunity to suggest that its use in a particular application is "wrong, inappropriate, unacceptable or indefensible on the facts, or inconsistent with legislative provisions supplying decision-making criteria" (*Kabul Farms* at para 44).

## VII. Costs

[71] Xplore seeks costs in a lump sum amount, and has submitted a draft bill of costs. Xplore says it is entitled to an elevated costs award of 25%, 33% or 50% of its actual costs, plus disbursements, totalling \$74,485.03, \$96,820.70 or \$144,284.00 respectively. Xplore notes that the financial stakes of the case were high, and involved a public interest component. The litigation continued for more than three years. Xplore's theory of the case evolved as more information was disclosed, and culminated in an argument premised on conspiracy and bad faith.

[72] The Minister says there was nothing exceptional about the case to justify increased costs. Xplore's allegations of conspiracy and bad faith were unsubstantiated, and needlessly increased the duration and complexity of the proceeding. The Minister agreed to numerous requests for documentary disclosure, despite considering the information to be irrelevant. A motion to determine objections to questions asked during cross-examination was resolved on consent. The Minister therefore says that costs should be assessed in accordance with the high end of Column III of Tarriff B of the *Federal Courts Rules*, which it estimates to be in the region of \$25,000.00.

[73] Rule 400(1) gives this Court "full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid" (*Canada (Attorney General) v Rapiscan Systems Inc*, 2015 FCA 97 at para 10). The "default" for costs is expressed in Column III of Tariff B, unless the Court orders otherwise (Rule 407; *Allergan Inc v Sandoz Canada Inc*, 2021 FC 186 at para 25). Relevant factors for assessing costs are listed in Rule 400(3).

[74] While this case was of more than average complexity, much of this may be attributed to Xplore's unsubstantiated allegations of conspiracy and bad faith. The financial stakes for Xplore were high, but the case involved commercial interests rather than fundamental rights. There was a public interest component to litigating the issues raised in this proceeding, but this was modest when compared to Xplore's commercial interests.

[75] Having regard to all of the circumstances, I consider a costs award calculated in accordance with the high end of Column IV of Tariff B to be appropriate.

VIII. Conclusion

[76] The application for judicial review is granted, and the matter is remitted to the Minister for redetermination in accordance with these reasons.

[77] Costs are awarded to Xplore at the high end of Column IV of Tarriff B.

**JUDGMENT**

**THIS COURT’S JUDGMENT is that:**

1. The application for judicial is granted, and the matter is remitted to the Minister of Innovation, Science and Industry for redetermination in accordance with these reasons.
2. Costs are awarded to X-Spectrum 2 Inc, formerly known as Xplore Mobile Inc, at the high end of Column IV of Tarriff B.
3. If the parties are unable to agree upon the appropriate quantum of costs and disbursements, then the matter will be determined by an assessment officer.

“Simon Fothergill”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-2015-22

**STYLE OF CAUSE:** X-SPECTRUM 2 INC., FORMERLY KNOWN AS  
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CANADA

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** OCTOBER 1 & 2, 2025

**JUDGMENT AND REASONS:** FOTHERGILL J.

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