INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Global Telecom Holding S.A.E.

v.

Canada

(ICSID Case No. ARB/16/16)

PROCEDURAL ORDER NO. 10
DECISION ON GTH'S REQUEST OF 21 NOVEMBER 2019

Members of the Tribunal
Prof. Georges Affaki, President of the Tribunal
Prof. Gary Born, Arbitrator
Prof. Vaughan Lowe, Arbitrator

Secretary of the Tribunal
Ms. Lindsay Gastrell

8 December 2019

I. BACKGROUND

1. On 1 June 2018, the Tribunal issued Procedural Order No. 3 ("**PO3**"), which set forth the Tribunal's decision on each of the Parties' respective requests for document production.

2. On 18 March 2019, GTH wrote to the Tribunal, challenging the completeness of Canada's document production. GTH made a number of requests for relief, including the following:

> in the interest of procedural fairness and propriety, as well as parity of arms, in the event that Canada produces additional documents as a result of its earlier failure to satisfy its disclosure obligations, GTH respectfully requests permission to submit additional factual exhibits on the record either as part of the post-hearing submission process (if any) or as standalone exhibits.[1]

3. After Canada had the opportunity to respond, the Tribunal issued Procedural Order No. 9 ("**PO9**") on 25 March 2019. The Tribunal decided, *inter alia*, that:

> c. Canada is ordered to produce forthwith on a rolling basis all responsive documents that are available in a draft version regardless of the materiality of the difference between the draft and the produced final version.
>
> d. GTH's request for leave to produce additional evidence after the hearing is dismissed absent a sufficiently particularized application.[2]

4. On 21 November 2019, GTH submitted a letter to the Tribunal seeking leave to submit nine new documents (the "**New Documents**") into the record (the "**Application**"). GTH attached the New Documents as Appendices A to I to the Application.

5. On 24 November 2019, the Tribunal acknowledged receipt of the Application and provided instructions to the Parties. The Tribunal noted that GTH had referenced being prejudiced by not being able to make arguments or to cross examine witnesses on the New Documents. In this regard, the Tribunal stated:

[1] GTH's Letter of 18 March 2019, p. 5.

[2] Procedural Order No. 9, ¶ 16.

> The Tribunal is concerned about allegations of impairment of a Party's right to fully state its case. Claimant is invited to specify by no later than 27 November 2019 whether the Application is limited to seeking leave to submitting the nine appendices A to I on the record or is also meant to include any further requests.

6. In its message, the Tribunal also invited Canada to respond to the Application, noting that Canada should:

> reply precisely and in detail to Claimant's contention in paragraph 7 of the Application as to whether Respondent (a) has withheld metadata relating to produced documents, and (b) continues to withhold documents that should have been produced pursuant to the Tribunal's order in PO 9.

7. By email of 26 November 2019, GTH replied to the Tribunal's query and confirmed that "the Application is limited to seeking leave to submit Appendices A to I into the record as new Factual Exhibits and does not seek other relief."

8. On 4 December 2019, Canada submitted its response to the Application, together with Annex A and Appendices A to F.

II. SUMMARY OF THE PARTIES' POSITIONS

9. The Parties' positions on each New Document are set forth in Annex A. In this section, the Tribunal briefly summarizes the Parties' more general statements regarding Canada's document production.

A. GTH's Position

10. GTH states that from 17 September to 31 October 2019, Canada produced over 400 additional documents which should have been produced more than a year ago pursuant to PO3. According to GTH, there are material differences between the drafts recently produced and the final versions on the record. In addition, GTH alleges that "documents now produced contain **later (more final)** versions of some documents previously produced by Canada – suggesting that Canada may have selectively produced earlier drafts of

documents without producing the later or final iterations."[3] GTH also expresses concern that Canada continues to withhold documents in violation of PO9, because it "is inconceivable that there are no drafts" of certain documents that are on the record.[4]

11. According to GTH:

> Canada's illegitimate withholding of responsive documents has precluded GTH from citing to highly relevant documents in its pleadings, referring to them in oral submissions at the hearing, and cross-examining Canada's witnesses on their content. [A] number of the withheld documents directly contradict Canada's submissions and the oral evidence of Canada's witnesses at the hearing. In particular, GTH has been denied the opportunity to cross-examine Mr. Peter Hill and Mr. Iain Stewart with respect to the context and content of these documents and their own conflicting testimony. There can be no doubt that GTH has been prejudiced by Canada's extraordinary delay in disclosing the documents only now produced in its Supplementary Productions.[5]

B. Canada's Position

12. Canada objects to GTH's Application, arguing that the New Documents contain no new information and viewing the Application to be "simply an effort by the Claimant to re-argue its case."[6]

13. Canada submits that it has acted in good faith to comply with its document production obligations. In particular, the only reason that certain documents were not produced prior to the hearing as part of Canada's production pursuant to PO3 was that "Canada believed in good faith, based on conversations with Claimant's counsel, that the parties had agreed not to produce working drafts of responsive documents for which a final or more recent version existed."[7]

[3] GTH's Letter of 21 November 2019, ¶ 7 (*GTH's emphasis*).
[4] GTH's Letter of 21 November 2019, ¶ 7.
[5] GTH's Letter of 21 November 2019, ¶ 8.
[6] Canada's Letter of 4 December 2019, ¶ 4.
[7] Canada's Letter of 4 December 2019, ¶ 5.

14. According to Canada, after PO9 was issued and the Parties reached an agreement on the scope of production, Canada "fully complied in good faith with its production obligations."[8] Canada rejects GTH's suggestion that Canada is in violation of PO9 because it has not produced drafts of certain documents. For Canada, it is not surprising that drafts, to the extent they ever existed, were not retained. Moreover, Canada argues that drafts of exhibits C-449, R-447 and R-464 were in fact produced, contrary to GTH's assertion.

15. Canada also confirms that it did not selectively produce drafts or inappropriately withhold metadata. Given the level of review required to determine whether a document is the final version, the fact that Canada may have made an error identifying the latest version cannot be considered evidence of a lack of diligence or good faith.

III. ANALYSIS

16. In PO9, the Tribunal noted Canada's unqualified statement of compliance with all of its document production obligations stated in its letter of 15 March 2019.[9] The Tribunal further notes Canada's reiteration of the same unqualified statement in its letter of 4 December 2019 addressed to the Tribunal, stating:

> Canada already confirmed in communications with Claimant's counsel that Canada is not improperly withholding further drafts or metadata and that it has complied with PO 9.[10]

17. The Tribunal finds it neither to be appropriate nor efficient for it to enter the debate as to what counsel might have discussed amongst themselves or have believed in good faith. This includes in particular the telephone call amongst counsel on 2 August 2019 and the exchange of emails that followed that call.[11] The Tribunal has ordered in PO9 that Canada shall produce forthwith on a rolling basis all responsive documents that are available in a draft version regardless of the materiality of the difference between the draft and the

[8] Canada's Letter of 4 December 2019, ¶ 10.
[9] PO9, ¶ 11.
[10] Canada's Letter of 4 December 2019, ¶ 4.
[11] Appendices E and F to Canada's Letter of 4 December 2019.

produced final version.[12] This order remains effective. GTH's bringing to the attention of the Tribunal, for the first time, in its letter of 21 November 2019 that the ordered rolling production only began on 17 September 2019 has not been preceded by protests by GTH as to the unwarranted lapse of time since PO9 had been issued six months ago. In fact, the emails exchanged between August and October 2019, produced in Appendices E and F to Canada's letter of 4 December 2019, without surprise reflect the collaborative, civil approach to solving the issue that is expected of counsel in this arbitration. The Tribunal infers that the production took place in accordance with a timeline that came as of no surprise to GTH. Whilst GTH now claims that it "has been prejudiced by Canada's extraordinary delay in disclosing the documents",[13] the Tribunal can only observe that GTH seems to have been content to allow the production process to roll over as agreed with Canada without seeking any injunctive relief of the Tribunal or other forms of investigation of the reason for the delay in the ordered production. Had GTH considered Canada's production process to amount to an "extraordinary delay" as is being now claimed, the Tribunal would have expected more diligence of GTH in denouncing a potential breach of PO9 and its consequences on GTH's case. None of that has happened before GTH's Application.

18. In the same vein, the Tribunal need not go into the debate of whether the allegedly withheld drafts – assuming in-scope drafts have been withheld by Canada from the ordered production – fall within the scope of transitory records the destruction of which is authorised in the policy documents adduced by Canada as Appendices A and B. PO9 is clear in ordering that responsive documents in draft form must be produced. Intimations and expressions of scepticisms, however compelling they may appear to the intimater, are insufficient to rebut Canada's unqualified statement that it is not improperly withholding drafts and that it has complied in good faith with its production obligations.[14]

[12] PO9, ¶ 13.

[13] GTH's Letter of 21 November 2019, ¶ 8.

[14] Canada's Letter of 4 December 2019, ¶¶ 4, 10.

19. In Annex A, the Tribunal reviews the arguments averred by each Party in support or in opposition of the admission of each of the New Documents into the evidential record.

20. More generally, with respect to all the New Documents, the Tribunal refers to paragraph 16.5 of Procedural Order No. 1, which provides:

> Neither party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission, unless the Tribunal determines that exceptional circumstances exist based on a reasoned written request followed by observations from the other party.

21. In the present circumstances, the Tribunal accepts that GTH could not have submitted the New Documents earlier, as their rolling production was only completed on 31 October 2019.[15] The Tribunal also considers that GTH has provided a sufficiently reasoned request showing that the standard in paragraph 16.5 is met.

IV. DECISION

22. The Tribunal's decision with respect to each of the nine New Documents is contained in Annex A. The Tribunal considers that the difference underscored by GTH in its Application as concerns each of the New Documents compared with the corresponding document that is on the record speaks for itself, and Canada's reply in Annex A to its letter of 4 December 2019 stands as a rebuttal. As a result, the Tribunal stands ready to resume its deliberations suspended by the submission of the Application. That said, the Tribunal is open to the Parties potentially agreeing on a limited briefing schedule to discuss the impact of the New Documents on their case. Any such agreement should be indicated to the Tribunal by 16 December 2019, stating the filing dates of the respective submissions. Absent an agreement, each Party is invited to make separate submissions by the set date.

[15] GTH's Letter of 21 November 2019, ¶ 2.

On behalf of the Tribunal,

[signed]

Prof. Georges Affaki
President of the Tribunal
Date: 8 December 2019

App.	Description	Key New Or Amended Text In Draft	Relevance To The Arbitration	Canada's Response	Tribunal's Decision
A	*Applying Time Restrictions to Spectrum Caps: Decision Summary*, 26 September 2012 **Original Exhibit Reference**: R-489	This document includes the following wording that was amended in the version that Canada previously disclosed (on the record as R-489): **Page 2:** "*We recommend retaining the spectrum caps for a period of five years from the conclusion of the auction. This timeframe reduces the attractiveness of the licences for speculators yet permits market adjustments within a reasonable period.*" "*Any longer than five years would impede the ability of players to adjust to the rapid transformation in technology and could impede the efficient functioning of markets.*"	In the context of spectrum caps for the 700 MHz auction, this document confirms that Canada was well aware of the importance of a viable exit strategy for prospective New Entrants after a **finite** 5-year period, and the corresponding need to set a **finite** restriction on the transfer of spectrum licenses to encourage New Entrants to invest. This directly supports Claimant's case and contradicts Canada's defenses: *see* Claimant's Memorial on the Merits and Damages, 29 September 2017 ("**GTH MoMD**"), ¶¶ 104-109, Part VII.A.2.a.i; Claimant's Reply on Merits and Damages & Counter-Memorial on Jurisdiction and Admissibility, 5 November 2018 ("**GTH RoMD**"), Part II.B, ¶ 277; Claimant's Post-Hearing Submission, 24 May 2019 ("**GTH PHS**"), ¶¶ 17(a), 17(c)(iii), 20(d), 22(a), 22(c). Claimant has been prejudiced by not being able to make arguments or cross-examine witnesses on this document at the hearing (in particular, Mr. Hill and Mr. Stewart) to confirm that Canada was well aware that potential exit strategies were important to bidders pre- auction. *See, e.g.*, Day 4 Tr. 35:9-36:8, 36:2537:2, 201:1-21 (Hill); Day 4 Tr. 227:18-228:3 (Stewart); Day 5 Tr. 113:20-114:15 (Stewart).	(1) The draft adds nothing substantively new to the record. Language similar to the extract cited by the Claimant and relating to the time frame of the spectrum cap and the objective of deterring speculation and supporting competition in the wireless telecommunications market is found in **R-489**, p. 1, last two bullets, p. 2, first and last bullets. (2) In the event that the Tribunal allows this draft onto the record, Canada notes that the draft is of limited relevance and does not support the arguments presented by the Claimant. The document discusses the **introduction of measures to support competition in the 700Mhz auction** (which took place at the end of 2013)**, not measures introduced in the 2007 AWS auction**. Therefore, the inferences that the Claimant draws from the document are questionable. While the document discusses the rationale for the introduction of measures to support competition in the 700Mhz, including a spectrum cap, and whether a spectrum cap should be accompanied by a time limit, it **does not acknowledge the importance of exit strategies** for auction participants as the Claimant suggests. Instead, the document confirms that the **objectives of the measures are "to limit non-competitive behaviour, reduce opportunities for speculation and ensure that Canadians benefit from a competitive market**." (3) The Claimant already had the opportunity to cross-examine Canada's witnesses on the issue of the Government's consideration of exit options for AWS auction participants. The Claimant questioned Mr. Hill on exit options. [Day 4, pp. 157:16-158:6 (Hill)]. Professor Lowe did so as well; and the Claimant chose not to re-exam Mr. Hill after those questions.	The Tribunal notes the difference between Appendix A produced by GTH and R-489. Whether the difference is substantial, relevant, or is already conveyed in a document that is on the record is a matter for the Tribunal to decide pursuant to its discretion to accord the appropriate weight to the evidence. Appendix A is admitted into the evidential record as C-466.

				[Day 4, p. 213:21-22 (Hill)]. The Claimant also had the chance to question Mr. Stewart on exit options. [Day 4, p. 227:13-24 (Stewart)]. Thus the Claimant's contention that it has somewhat been prejudiced by the non-communication of this document is ill-founded. The Claimant also had the opportunity to cross- examine Canada's witnesses on the rationale for a five-year moratorium and what would happen afterwards. It should be clear by now that what is at issue is not the time period for which the moratorium was imposed, but whether Canada made a specific and unambiguous representation that after five years, the Minister would approve all applications to transfer set-aside licences as long as the licensees met the eligibility criteria.	
B	Industry Canada, *Clarification Questions to the Policy Framework and Amendments and Supplements to the Licensing Framework for the Auction for Spectrum Licences for Advanced Wireless Services and other Spectrum in the 2GHz Range [draft],* 19 February 2008	This document includes the following wording that does not appear in the public version of the document (on the record as C-062): Page 9: "*In addition, the condition that a new entrant hold a licence for five years before transferring to a non-new entrant is merely to be consistent with the intent of the set-aside provision in this licensing process.*"	This document confirms that Canada intended the 5-year transfer restriction to be a finite period after which set-aside spectrum licenses could be sold to Incumbents. This directly supports Claimant's case and contradicts Canada's defenses: see GTH MoMD, ¶¶ 104-109, 328-30; GTH RoMD, ¶¶ 37-39, 282-85; GTH PHS, ¶¶ 2(b), 22-23. In addition, this document directly corroborates the testimony of Mr. Connolly that the 5-year transfer restriction was put in place to facilitate new entry and to deter arbitrage of spectrum licenses: see Day 3 Tr. 137:19-138:5, 142:22143:7, 149:1-149:13, 152:23153:6, 181:12-182:4 (Connolly). Claimant has been prejudiced by not being able to make arguments or cross-examine Mr. Hill on this document at the hearing, who attempted to discount similar contemporaneous evidence on the record. See Day 4 Tr. 111:20-112:14, 117:1-11, 122:18-	(1) The draft adds nothing substantively new to the record. Many documents on the record address the objectives of the five-year moratorium. Exhibit C-004 states that Canada's objective in setting the policy framework for the AWS Auction was to enhance and sustain competition beyond the Incumbents. Peter Hill addressed this issue in his witness statement [RWS-Hill 2, ¶¶ 17-18] and the Claimant had the opportunity to cross-examine him. On the objectives of the 2008 AWS Auction, the set-aside, and of the five-year moratorium, he explained in cross-examination: "[w]e were always looking for --and this is from the early days, internal deliberations in late 2006 and 2007, through our public consultations -- we were looking for competition beyond the incumbents" [Day 4, p. 91:13-17 (Hill)] and "[t]he intention was to bring about competition to the three incumbents. We went in with the full intention to see that through." [Day 4, p. 117:7-9 (Hill)]. (2) In the event that the Tribunal allows this draft	The Tribunal notes the difference between Appendix B produced by GTH and C-062. Whether the difference is substantial, relevant, or is already conveyed in a document that is on the record is a matter for the Tribunal to decide pursuant to its discretion to accord the appropriate weight to the evidence. Appendix B is admitted into the evidential record as C-467.

	Original Exhibit Reference: C-062		123:16, 124:13-125:17, 146:20-147:3, 154:2-14, 165:18-166:14 (Hill).	onto the record, it should be given little to no evidentiary weight. This document is a working draft, situated in the middle of 17 versions of this document, and several of the later versions, including the final public version communicated to the public, do not contain this language. (3) Even more importantly, the language cited by the Claimant and deleted from later drafts does not support the conclusions drawn by the Claimant. The sentence does not discuss what would happen at the end of the five-year moratorium and does not state that sales to Incumbents would be allowed. It merely refers to the intent of the set-aside provisions. As Canada has established, the objective of the AWS auction, including the set-aside, was to sustain and enhance competition in the wireless telecommunications market.	
C	Industry Canada, *Wireless Telecommunications Sector: Update and Implications,* c. November 2012 **Original Exhibit Reference**: C-262	This document includes the following wording that does not appear in the version that Canada previously disclosed (on the record as C-262): **Page 1**: "*While all requests to transfer spectrum licences must be approved by Industry Canada, the department has no transfer conditions relating to competition, aside from the 5year restriction on selling setaside AWS spectrum to incumbents, which begins to expire in late 2013.*" This document also includes the following wording that	This document confirms that Canada effected a fundamental change in 2013 by adding undue spectrum concentration as a new factor in the review of transfer applications in order to block the sale of Wind Mobile to Incumbents after the 5-year transfer restriction had expired. This directly supports Claimant's case and contradicts Canada's defenses: see GTH MoMD, Parts IV.C, V.C.2.d; GTH RoMD, Parts II.B, IV.A.2.a; GTH PHS, ¶¶ 16, 19(e), 20(c), 23(b), 23(d). Claimant has been prejudiced by not being able to make arguments or cross-examine key witnesses on this document at the hearing, particularly as it directly contradicts Mr. Hill's and Mr. Stewart's testimony that	(1) The draft adds nothing substantively new to the record as it is dated November 2012 and appears to be a slightly earlier version of **C-258** dated December 7, 2012, which does in fact contain **similar, or almost identical, language** to the text cited by the Claimant. The language in **C-258** and the issues raised by the Claimant in relation to Exhibit C were addressed at length at the hearing. They were addressed by Mr. Stewart in his second witness statement [RWS-Stewart-2, ¶¶ 7-8]. As the Claimant acknowledges, **it has already cross-examined Mr. Stewart and Mr. Hill on the expiry of the five-year restriction and what, if any, additional restrictions on spectrum transfer existed at the time**. [Day 4, pp. 139:2-25 (Hill); Day 5, p. 52:16-23 (Stewart)]. For instance, in response to the Claimant's questions about Ministerial discretion, Mr. Stewart explained that neither the Department nor the Minister could confer	The Tribunal notes the difference between Appendix C produced by GTH and C-262. Whether the difference is substantial, relevant, or is already conveyed in a document that is on the record is a matter for the Tribunal to decide pursuant to its discretion to accord the appropriate weight to the evidence. Appendix C is admitted into the evidential record as C-468.

		was amended in the version that Canada previously disclosed (on the record as C-262): **Page 5:** "*All spectrum licence transfers require the approval of IC. However, aside from the from the 5-year restriction on selling set-aside AWS spectrum to incumbents, the department currently has no additional restrictions on spectrum transfers. In contrast with the number of potential spectrum transfer requests in the near term, very few (5) mobile spectrum transfers have been requested in the last 10 years, despite the department's stated policies of encouraging secondary market transactions. Spectrum that was effectively reserved for new entrants in 1995 was transferred to incumbents in the early 2000s with the department's approval.*" "*The Competition Bureau has never objected to a spectrum transfer request.*" **Page 6:** "*IC would not be in a position to object to spectrum licence transfers that would reduce*	competition and undue spectrum concentration were bases upon which Industry Canada could object to a license transfer prior to 2013. *See, e.g.*, Day 4 Tr. 133:4-14 (Hill); Day 5 Tr. 72:7-24, 74:13-19, 75:917 (Stewart). In particular, Claimant would have presented such evidence to cross-examine Mr. Stewart with respect to his credibility and unfounded allegation that references to "additional Ministerial discretion" (or similar statements) in these contemporaneous documents were his own "error[s]." See, e.g., Day 5 Tr. 27:6-24, 36:2245:25, 76:8-18 (Stewart).	"additional discretion" on the Minister, since only the legislature has this power. [Day 5, p. 33:3-20 (Stewart)]. The Claimant asked Mr. Stewart about considering **spectrum concentration prior to the Transfer Framework**; he answered: "[t]he policy framework going back to 1998 and 2001 around spectrum auctions indicates one of the background considerations for the department is spectrum concentration." [Day 5, p. 18:13-19 (Stewart)]. He also explained: "the macro policy documents about how we approach auctions both indicate that spectrum concentration is a legitimate area of concern." [Day 5, p. 20:12-15 (Stewart)]. Moreover, when the Claimant questioned Mr. Hill on this issue, he explained: "in fact, spectrum concentration was a consideration in one of the earlier transfer requests that the department received". [Day 4, p. 135:8-12 (Hill)]. He noted that Industry Canada considered spectrum concentration in providing advice to the Minister on the Telus-Clearnet transfer. [Day 4, p. 141:9-17 (Hill)]. Furthermore, Mr. Stewart was questioned at the hearing about the roles of the **Competition Bureau** and Industry Canada. He explained in response to questions from Professor Lowe that while the Competition Bureau could review proposed mergers or acquisitions involving spectrum licence transfer requests for their competitive impacts, this was an "imperfect tool to rely upon" because it was "not going to protect us against spectrum accumulation." [Day 5, pp. 137:10-139:21] Thus, he noted, in response to questions from Professor Born, that the Department developed the Transfer Framework partly to inform the market that it would brief the Minister on spectrum transfer requests having regard to spectrum concentration and competition. [Day 5, pp. 133:3-137:9 (Stewart)] The Claimant chose not to question Mr. Stewart further following these answers. [Day 5, p. 142:21-23 (Stewart)]	

		the limited pool of spectrum available to new entrants and increase incumbents' spectrum dominance. [REDACTION]. *The Competition Bureau would be the sole body that could review spectrum licence transfer requests with competitive impacts in mind, with any objections involving a lengthy legal process*."		The Claimant's suggestion that language in the November 2012 draft similar to the one in C-258 could impeach Mr. Stewart's credibility lacks any basis. As explained during the hearing, the "additional discretion" language was an error and was later deleted in the briefing note from Marta Morgan and John Knubley to the Minister of Industry, dated January 2013, **C-262**. [Day 5, pp. 43:18-45:2; 73:14-75:7 (Stewart)]. (3) In the event that the Tribunal allows this draft onto the record, Canada notes that the draft fails to support the Claimant's argument that the Transfer Framework was a fundamental change of the regulatory framework. Thetestimonies of Mr. Hill and Mr. Stewart in response to the Claimant's questions on this issue confirm that the Transfer Framework's specification of spectrum concentration as a factor that the Department would consider in reviewing licence transfer requests was: (i) consistent with the objectives of the 2008 AWS Auction; (ii) in line with some of the Department's past practices; and (iii) within the Minister's statutory authority. In fact, Mr. Connolly agreed that spectrum concentration is a valid factor for the Minister to consider in reviewing transfer applications. [Day 3, p. 154:5-25 (Connolly)] Finally, the draft's statement that "very few (5) mobile spectrum transfers have been requested in the last 10 years" **undermines the Claimant's assumption that the Department's past practice meant Industry Canada would allow the sale of a New Entrant to an Incumbent**. [Claimant's Memorial, ¶ 314]. As Mr. Hill explained when the Claimant questioned him on the Department's concerns over the moratorium's ending, Industry Canada adopted the Transfer Framework partly to "deal with the potential of a number of applications coming to us all at once; something unprecedented that we had never	

				seen before." [Day 4, p. 140:8-17 (Hill)]. Understood in this context, the draft's statement supports Canada's position that it was not reasonable to assume that the Minister would necessarily approve all license transfers as long as the applicant met the eligibility criteria.	
D	Letter from Iain Stewart to Marie-Josée Thivierge [draft], 7 November 2012 **Original Exhibit Reference**: C-336	This document includes the following wording that was amended in the version that Canada previously disclosed (on the record as C-336): **Page 1:** "*Previously, telecommunications common carriers were required to be Canadian owned and* *controlled, limiting the ability of smaller carriers and new entrants to access the capital they need to grow and compete. The objective of the legislative reform was to improve access to capital for these companies that need it most. The proposed transaction between Orascom and Globalive is the type of investment that was envisioned when the legislative change was proposed and is line with the Government's broader competition and investment goals."*	This document confirms that Canada intended to permit transactions like GTH's Voting Control Application when it relaxed foreign ownership restrictions. This directly supports Claimant's case and contradicts Canada's defenses: *see* GTH MoMD, Part V.C.1; GTH RoMD, Parts II.G, IV.A.3; GTH PHS, ¶ 58. Claimant has been prejudiced by not being able to make arguments or cross-examine key witnesses on this document at the hearing, particularly Ms. Aitken with regard to Claimant's contention that the foreign ownership restrictions were relaxed in order to permit transactions like GTH's Voting Control Application. *See, e.g.*, Day 5 Tr. 324:13-20 (Aitken).	(1) The draft adds nothing substantively new to the record. The paragraph in this draft that GTH identifies as containing key new or amended text is composed of three sentences. The first sentence starting with the word "previously" was moved in paragraph 2 of the final version of the document produced as exhibit **C-336** where it can be found in its entirety. While the second sentence starting with the words "The objective" is not found in the final version it is clear from exhibit **C-336** that the objective of the June 2012 amendments was to improve the ability of smaller carriers and new entrants to access capital. This fact is also non-controverted in this arbitration and a substantially similar sentence may be found in the news release announcing the legislative amendment (exhibit **C-023**): "This will help telecom companies with a small market share access the capital they need to grow and compete". The third and final sentence in the identified draft paragraph, starting with the words "The proposed transaction" was replaced in the final version with asubstantially similar sentence in the first paragraph: "From a telecommunications policy perspective, the proposed transaction is consistent with the goals of the recent reform to telecommunications foreign investment restrictions and the government's stated policy objectives for the industry." At the hearing, the President of the Tribunal specifically brought this sentence to the attention of Canada's witness, Mr. Iain	The Tribunal notes the difference between Appendix D produced by GTH and C-336. Whether the difference is substantial, relevant, or is already conveyed in a document that is on the record is a matter for the Tribunal to decide pursuant to its discretion to accord the appropriate weight to the evidence. Appendix D is admitted into the evidential record as C-469.

				Stewart, and asked him to elaborate on it. [Day 5, pp. 140:18-142:19 (Stewart)]. The Claimant could similarly have questioned Mr. Stewart on this point but chose not to. This final sentence is also substantially similar to a statement Ms. Jenifer Aitken makes in her second witness statement: "In fact, the information my staff and I received from the Strategic Policy Sector of Industry Canada before the initiation of the national security review was that GTH's proposed acquisition of voting control of Wind Mobile was consistent with Canada's telecommunications policy objectives." [RWS-Aitken-2, ¶ 6]. At the hearing, the President of the Tribunal asked Ms. Aitken to confirm her statement, which she did. [Day 5, p. 323:12-324:20 (Aitken)]. The Claimant could similarly have questioned Ms. Aitken on this point but chose not to. (2) The Claimant's contention that it has somewhat been prejudiced by the non- communication of this document is therefore ill- founded. In the event that the Tribunal allows this draft onto the record, its content does not support the Claimant's argument that Canada conducted a national security review of GTH's proposed acquisition of voting control of Wind Mobile to advance telecommunications policy objectives. To the contrary, the document establishes that GTH's proposed investment in Wind Mobile was consistent with Canada's telecommunications policy objectives and hence there would have been no reason to invoke the pretext of a national security review to advance those objectives.	
E	Memorandum from John Knubley to	This document includes the following wording that does not appear in the version that Canada previously disclosed	This document confirms that in order to have the authority to block spectrum transfers on the basis of undue spectrum concentration, Canada had to revise the conditions of the	(1) The draft adds nothing substantively new to the record. The issues raised in the extract from the draft contained in the third column are addressed by Peter Hill in his Witness Statements. He explains	The Tribunal notes the difference between Appendix E produced by GTH and C-279.

	Minister of Industry, *Framework Relating to Transfers, Divisions and Subordinate Licensing of Spectrum Licences for Commercial Mobile Spectrum*, 3 June 2013 **Original Exhibit Reference**: C-279	(on the record as C-279): **Page 1:** "*In order to give regulatory force to the provisions of this framework, it is necessary to add these provisions both the conditions of licence for affected commercial mobile spectrum licences, as well as to Industry Canada's Spectrum Licence Procedures, CPC 2-123,* Licensing Procedure for Spectrum Licences for Terrestrial Services."	set-aside spectrum licenses and in particular the condition in the licenses relating to transfer. This directly supports Claimant's case and challenges Canada's case: *see* GTH MoMD, ¶ 242, Part VII.A.2.b; GTH RoMD, Part IV.A.2; GTH PHS, ¶¶ 17(d), 23(b)(i), 31(a)(i). Claimant has been prejudiced by not being able to make arguments or cross-examine key witnesses on this document at the hearing, particularly as it contradicts Mr. Hill's and Mr. Iain Stewart's testimony that competition and undue spectrum concentration were bases upon which Industry Canada could object to a license transfer prior to 2013. *See, e.g.*, Day 4 Tr. 133:4-14 (Hill); Day 5 Tr. 72:7-24, 74:13-19, 75:917 (Stewart). This document would further have been put to Mr. Hill in relation to his testimony that revising license conditions was an "*extreme situation*" and would constitute an "*extraordinary circumstance.*" See Day 4 Tr. 39:14-20, 48:18-23, 117:18118:3, 198:17-199:20; 201:1-21 (Hill).	that Industry Canada amended the Licensing Circular and the Conditions of Licence of pre-existing commercial mobile spectrum licences to reflect the Transfer Framework. [RWS-Hill, ¶ 131; Annex A: *TELUS Communications Company v. Attorney General of Canada et al.*, Affidavit of Peter Hill (Oct. 25, 2013), ¶ 67] (2) As referenced above in section C, the Claimant had ample opportunity to present arguments and cross-examine Canada's witnesses with respect to competition and spectrum concentration as bases upon which the Minister could object to a transfer. In addition, the ability of the Minister to amend conditions of licences has also been extensively addressed by the parties and the witnesses in their submissions and at the hearing [Day 2, p. 11:2-16 (Canada's Opening); Day 3, p. 160:8-11 (Connolly); Day 4, p. 48:13-23 (Hill); Day 9, pp. 207:21-25, 208:22-209:6 (Canada's Closing)]. (3) In the event that the Tribunal allows this draft onto the record, Canada notes that the language relied upon by the Claimant does not discuss the existing *authority* of the Minister to approve or deny spectrum transfers nor does it allow for the conclusion proposed by the Claimant. The language simply addresses the manner in which the transfer framework would be implemented/ operationalized. As explained at the hearing, the amendments to the conditions of licences were introduced as a matter of administrative procedural fairness and because of the deemed transfer provision. [Day 2, p. 72:4-13 (Canada's Opening), Day 8, pp. 210:15-211:4 (Q&A session)]. By amending the COLs, which incorporate by reference the CPC, the framework would be enforceable against the licensees and government could ensure compliance with the framework through enforcement tools under the	Whether the difference is substantial, relevant, or is already conveyed in a document that is on the record is a matter for the Tribunal to decide pursuant to its discretion to accord the appropriate weight to the evidence. Appendix E is admitted into the evidential record as C-470.

				licence and the *Radiocommunication Act*. The Department amended the COLs to incorporate the elements of the Transfer Framework related to "deemed transfers". [RWS-Hill, Annex A: *TELUS Communications Company v. Attorney General of Canada et al.*, Affidavit of Peter Hill (Oct. 25, 2013), ¶¶ 67-69]. As for the explicit clarification in the Transfer Framework that the Minister would consider spectrum concentration in licence transfer reviews, Mr. Stewart states that the Department considered it advisable to first consult licensees on this criteria. [RWS-Stewart-2, ¶ 7]. Yet it was always within the scope of the Minister's statutory discretion to consider spectrum concentration when reviewing transfer requests, as noted in row C above.	
F	Industry Canada, *Wireless Telecommunications Sector: Update and Implications* [draft], 3 December 2012 **Original Exhibit Reference**: C-258	This document includes the following wording that was amended in the version that Canada previously disclosed (on the record as C-258): **Page 11:** Referring to "[AWS] *Spectrum Reserved for New Entrants Combined*": "*Can be sold to incumbents starting in late 2013*" **Page 13:** "*Status Quo – Allow all spectrum transfers once 5 year rule expires*" **Page 15:**	Claimant repeats the submissions made at rows A, B & C above, noting in particular that Claimant has been prejudiced by not being able to make arguments or cross-examine key witnesses on this document at the hearing, including Mr. Hill and Mr. Stewart regarding the importance of an exit strategy to investors and Canada's intention for the 5-year transfer restriction to be finite.	(1) The draft adds nothing substantively new to the record. (2) Canada repeats its submissions in rows A, B, and C above as they relate to the Claimant's allegation that it has not been able to cross-examine key witnesses at the hearing regarding exit opportunities, the finite nature of the five-year moratorium, as well as the Minister's authority to consider spectrum concentration when reviewing licence transfer requests. (3) In the event that the Tribunal allows this draft onto the record, this document dated December 3, 2012, a few days prior to the note dated December 7, 2012 and exhibited at **C-258**, should be given little to no evidentiary weight because the cited extracts were revised or eliminated in subsequent briefing notes. The extract from page 11 of the draft "can be sold to incumbents" was revised to state that New Entrants "[c]an request to transfer to incumbents starting in	The Tribunal notes the difference between Appendix F produced by GTH and C-258. Whether the difference is substantial, relevant, or is already conveyed in a document that is on the record is a matter for the Tribunal to decide pursuant to its discretion to accord the appropriate weight to the evidence. Appendix F is admitted into the evidential record as C-471.

		"***Extend AWS set-aside transfer restriction*** *until end of licence terms* - *Would prevent incumbents from purchasing set-aside AWS and increase the likelihood that it is acquired by new entrants* - *No additional review criteria required* - *Does not provide criteria for spectrum transfers in other band s* - [REDACTION]" **Page 16:** Referring to New Entrants: "*Even still they will want to keep an exit strategy and an additional 5 years may be too long"*		late 2013". [Emphasis added. **C-258**, Exhibit Page 21; **C-264**, slide 10; **C-260**, Exhibit Page 13] The extract from page 13 which describes the status quo inaccurately was removed in subsequent drafts. The description of the status quo in subsequent drafts focusses instead on whether there would be a review of spectrum concentration concerns. The extracts from pages 15 and 16 do not raise new substantive issues. Canada refers the Tribunal to its response in row C regarding the Minister's authority to consider spectrum concentration in reviewing licence transfer requests, and row A regarding exit opportunities.	
G	Industry Canada, *Competition in the Wireless Sector* [draft], 25 January 2013 **Original Exhibit Reference**: C-338	This document includes the following wording that does not appear in the version that Canada previously disclosed (on the record as C-338): **Page 10:** "*All licence transfer requests require approval from*	Claimant repeats the submissions made at row C above, noting in particular that Claimant has been prejudiced by not being able to make arguments or cross-examine key witnesses on this document at the hearing, including Mr. Hill and Mr. Stewart regarding the fact that adding undue spectrum concentration as a criteria for transfers amounted to changing the existing rules.	(1) The draft adds nothing new to the record. The exact language cited by the Claimant "All licence transfer requests require approval from Industry Canada. However, aside from the 5 year restriction on AWS set -aside spectrum, there are no other specific conditions related to competition" is contained in **C-264**, slide 12 and **C-262**, Exhibit Page 15. Canada repeats its submissions in row C above (2) In the event that the Tribunal allows this draft onto	The Tribunal notes the difference between Appendix G produced by GTH and C-338. Whether the difference is substantial, relevant, or is already conveyed in a document that is on the record is a matter for the

		Industry Canada - *However, aside from the 5 year restriction on AWS set-aside spectrum, there are no other specific conditions related to competition* *'Option' agreements not anticipated*"		the record, Canada notes that the draft fails to support the Claimant's argument that the Transfer Framework was a fundamental change of the regulatory framework, as noted in Canada's response in row C.	Tribunal to decide pursuant to its discretion to accord the appropriate weight to the evidence. Appendix G is admitted into the evidential record as C-472.
H	Memorandum from John Knubley and Marta Morgan to Minister of Industry, *Measures to Sustain Competition in Wireless Sector*, 29 January 2013 **Original Exhibit Reference**: C-265	This document includes the following wording that does not appear in the version that Canada previously disclosed (on the record as C-265): **Page 1:** "*At that time we concluded that the proposed option agreement was not specifically prohibited by the AWS conditions of licence, although we considered the option agreement inconsistent with the intent of the conditions and the framework*." **Page 2:** "*The current procedures for transfer approvals do not include an analysis of concentration/competition. But announcing a consultation with stakeholders now will signal that the new procedures*	Claimant repeats the submissions made at row C above, noting in particular that Claimant has been prejudiced by not being able to make arguments or cross-examine key witnesses on this document at the hearing, including Mr. Hill and Mr. Stewart regarding the fact that adding undue spectrum concentration as a consideration for transfers amounted to changing the existing rules.	(1) The draft adds nothing substantively new to the record. Canada repeats its submissions in row C above. (2) Moreover, the extract from page 1 of the draft contained in the third column does not address the issues that the Claimant raises in the fourth column. The extract refers to the conclusion that the option agreement did not breach the existing AWS conditions of licence (which was communicated to Rogers and Shaw in **R-099**, Letter from Peter Hill to Ken Engelhart and Jean Brazeau (Nov. 19, 2012)). (3) In the event that the Tribunal allows this draft onto the record, Canada notes that the language in paragraph 1 supports Canada's explanation that the intent of the AWS framework was not for spectrum issued to New Entrants to end up in the control of the Incumbents. [RWS-Stewart, ¶¶ 10-11, 28, 34; Day 4, p. 258:1-15 (Stewart); Day 4. p. 140:21-22 (Hill)]. Further, the extract from page 2 describes "current procedures" -- it does not address the Minister's authority to consider spectrum concentration when reviewing licence transfer requests. It also supports Canada's submissions that (1) the licensees would have had to request a transfer of set aside licences to	The Tribunal notes the difference between Appendix H produced by GTH and C-265. Whether the difference is substantial, relevant, or is already conveyed in a document that is on the record is a matter for the Tribunal to decide pursuant to its discretion to accord the appropriate weight to the evidence. Appendix H is admitted into the evidential record as C-473.

		would be in effect before any AWS setaside licensees are able to request a transfer to any incumbent and before the 700 MHz auction."		Incumbents (2) the procedures were subject to change (3) and that Canada was concerned with ensuring procedural fairness in making these changes.	
I	[redacted]	This document includes the following wording that does not appear in the version that Canada previously disclosed (on the record as C-366): [redacted]	Claimant repeats the submissions made at rows B & C above, noting in particular that Claimant has been prejudiced by not being able to make arguments or cross-examine key witnesses on this document at the hearing, including Mr. Hill and Mr. Stewart regarding the importance of an exit strategy to investors and Canada's intention for the 5-year transfer restriction to be finite.	(1) The draft adds nothing new to the record. An identical version of this document with the exact same wording is already on the record at **C-420. The only difference between** Appendix I and C-420 is that that C-420 contained a date stamp and signature. (2) In the event that the Tribunal allows this draft onto the record, Canada repeats its submissions in rows A, B, and C above as they relate to the Claimant's allegation that it has not been able to cross-examine key witnesses at the hearing regarding exit opportunities, the finite nature of the five-year moratorium, as well as the Minister's authority to consider spectrum concentration when reviewing licence transfer requests.	The Tribunal notes the difference between Appendix I produced by GTH and C-366. Whether the difference is substantial, relevant, or is already conveyed in a document that is on the record is a matter for the Tribunal to decide pursuant to its discretion to accord the appropriate weight to the evidence. Appendix I is admitted into the evidential record as C-474.