

Federal government ordered to pay investors hundreds of millions for failing to live up to wireless spectrum licence auction promises

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In *Quadrangle v. Attorney General of Canada*, the Ontario Superior Court held the federal government liable for hundreds of millions of dollars in damages to investors in wireless spectrum licences. The Court found that the plaintiffs invested on the basis that they could exit by selling the licences to a major provider after five years, in the event the business was not successful. However, the government later changed the statutory framework to prohibit that transfer. The decision turns on its facts, and a detailed analysis of whether, given the circumstances, the government owed the investors a duty of care sufficient to ground a private law claim for damages. The Court found the government owed and breached its duties.

Background

The Government of Canada controls access to the radio frequency spectrum (commonly referred to as the wireless spectrum) in Canada. In 2008, the government auctioned licences for various bands of the wireless spectrum. The government hoped to raise money, and also to attract new entrants to compete with the three major wireless service providers. The government set aside licences that were available only to new entrants, and encouraged potential new entrants to bid.

The auction was very successful financially. And a new entrant, Mobilicity, successfully bid for several licences. The plaintiff investors funded Mobilicity, and paid the government \$243 million for Mobilicity's spectrum licences.

These licences were subject to a five-year moratorium period, during which they could not be transferred. The time-restricted nature of the non-transferable condition was key. New entrants would require financing to participate in the auction, and a crucial attribute to obtain financing was transferability — as recognized by the government at the time of the auction.

In the Court's words: "The Plaintiffs believed that there was an exit strategy for new entrants if they needed to sell. That was exactly the safety net required by potential new entrants. It was also exactly the safety net represented and offered by the government to incentivize

investors to fund new entrants.” The plaintiffs and government also knew that if the Mobilicity business failed in the five-year period the only likely potential buyers of their licences would be the established big three incumbents.

The playing field then shifted under the players’ feet. Five years after Mobilicity purchased the licences, the government amended the policy framework, cancelling and revoking the right to transfer the licences to incumbents.

The plaintiffs sued the government, seeking damages grounded in various private law claims, including claims in negligence and negligent misrepresentation.

The Court characterized the action as follows:

[D]id the Government induce parties to invest hundreds of millions of dollars in the Canadian cellular telephone market based on representations and promises of an available exit strategy, only to “pull the rug out” from underneath those parties when they tried and failed to compete in a market dominated by three well-funded incumbents?

Analysis

The Court held the federal government liable for negligence and negligent misrepresentation. The Court reasoned that the government owed a private law duty of care to the plaintiffs for the following reasons:

- Not only was it reasonably foreseeable, it was *foreseen* by the government that barring the transfer of the Mobilicity spectrum licences to an incumbent after the expiry of the five-year moratorium would cause harm to the economic interests of the plaintiffs. The government courted and induced the plaintiffs to participate in the 2008 auction process, expressly representing to the plaintiffs that there were “rules to help [new entrants] compete, and that [the] licence[s] would be transferable if things didn’t work out.” In the Court’s words: “Specific representations by a regulator to an individual, and reliance by that individual on those representations, will go a long way towards establishing a *prima facie* duty of care”.
- There are no policy reasons for declining to impose a duty of care in this case, where the plaintiffs were specifically known to the government. Significantly, the Court observed: “[w]hile the scope of [the government’s] policy discretion is broad, it cannot be so broad as to render meaningless specific representations intentionally and expressly made by the Government”.
- The government’s use of the auction to sell licences at market rates is an important feature of the Court’s analysis: “The Government effectively sold the licences to the Plaintiffs for approximately \$243 million,” with the result that these circumstances bear little resemblance to a more traditional licensing regime where a government issues a licence such as a driver’s licence or a business permit, for a nominal or administrative fee.

The Court held that the government breached its duty of care by unilaterally cancelling and revoking the right to transfer spectrum licences to an incumbent after the five-year moratorium, and by doing so in a manner that specifically impacted Mobilicity. In the Court’s words: “[t]he Plaintiffs’ losses were the direct and indeed intentional result of the Defendant’s conduct.”

Key takeaways

The government's broad discretion to make policy decisions may not absolve it of private law liability in all circumstances.

In this case, the result is a large award of damages designed to put the plaintiffs in the position they would have been in "but for" the government's misrepresentations — i.e., if the plaintiffs never invested in the spectrum licences or in Mobilicity and had instead deployed the same funds in alternative investments.

Given the circumstances of the case and the large amount at stake, an appeal is likely to follow.