

Federal Court



Cour fédérale

**Date: 20200506**

**Docket: T-600-19**

**Citation: 2020 FC 580**

**Ottawa, Ontario, May 6, 2020**

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

**BETWEEN:**

**ALEXANDR PETUKHOV, ZOHAR EL, DAN  
BRIGGS, AND MICHAEL PRATT**

**Applicants**

**and**

**THE ATTORNEY GENERAL OF CANADA,  
SOUTHEAST REGIONAL SERVICE COMMISSION,  
BRAGG COMMUNICATIONS INC. and TERRENCE  
LEBLANC AND SHARON LEBLANC**

**Respondents**

**JUDGMENT AND REASONS**

I. Nature of the Matter

[1] This is an application for judicial review pursuant to s. 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 of a decision made by Innovation, Science and Economic Development Canada (“ISED”) approving the erection of a telecommunications tower by the Respondent, Bragg

Communications Inc. (“Bragg”). The decision under review is that of ISED in an email dated March 14, 2019, communicating to the applicants that Bragg had completed the consultation process required pursuant to s. 4.3 of ISED’s Client Procedures Circular CPC-2-0-03 Radiocommunication and Broadcasting Antenna Systems (“the *Circular*”) and was therefore in compliance with its (Bragg’s) spectrum licence. The applicants contend, among other things, that Bragg and/or ISED failed to respect the requirements set out in the *Circular*. This failure, according to the applicants, results in a breach of procedural fairness or constitutes an unreasonable decision. For the reasons set out below, I allow the application, quash the ISED decision that the consultation process was successfully completed and order that Bragg and ISED properly undertake and complete the steps outlined in the *Circular*.

II. Summary of Procedures to be followed as set out in the *Circular*

[2] Bragg is a cable television and telecommunications company. It seeks to erect a tower on lands adjacent to the applicants’ property. The respondent ISED is responsible for the regulation of radio and telecommunications infrastructure in Canada.

[3] As a telecommunications provider, Bragg holds a spectrum license issued by the Minister of ISED. Paragraph 5 of Bragg’s spectrum license provides as follows:

While site-specific radio licenses will not be required for each station, licensees must ensure that each radio station is installed and operated in a manner that complies with Industry Canada’s Client Procedures Circular CPC-2-0-03, Radiocommunications and Broadcasting Antenna Systems, as amended from time to time.

[4] The *Circular* outlines a default consultation process to follow when a proponent seeks to install a tower. While the *Circular* provides that Land-Use Authorities may establish their own public consultation process, the Land-Use Authority in this case, the Southeast Regional Services Commission (“SRSC”), did not do so. Instead, it adopted the *Circular*’s default consultation process.

[5] The default consultation process sets out three (3) steps. First, the proponent (in this case, Bragg), must notify the local public, neighbouring land use authorities, businesses, property owners and others located within a radius of three (3) times the proposed tower height of the intended installation. Notification to the public may be accomplished by mailing or hand delivering a notice package, in some cases advertising in a local newspaper, and providing at least 30 days for written public comments. Because the applicants take no issue with the notification procedures undertaken by Bragg, no further observations will be made in that regard.

[6] The second step in the consultation process, titled “Responding to the Public” requires the proponent to respond to all “reasonable and relevant concerns”. While there is some dispute between the parties over the identification of “reasonable and relevant concerns”, there is no dispute about the process to follow at the second step. The *Circular* directs that “[i]f the local public or land-use authority raises a question, comment or concern relating to the antenna system as a result of the public notification process”, the proponent must follow three (3) steps. First, within 14 days it must acknowledge in writing receipt of the question, comment or concern and keep a record of the communication. Second, within 60 days of receipt of the question, comment or concern the proponent must address it in writing or explain why it does not, according to the

proponent, meet the test of “reasonable or relevant”. Finally, in the reply sent within 60 days of receipt of the question, comment or concern, the proponent is required to clearly indicate that the party has 21 days from the date of the correspondence to reply to the proponent’s response.

[7] The third step, titled “Public Reply Comments”, provides 21 days for the party to reply to the proponent’s response. The proponent is to keep a record of any discussions between it and members of the public who have questions, comments or concerns. The proponent is required to provide a copy of all public reply comments to the local ISED office.

### III. Procedure Followed in the Circumstances

[8] Pursuant to the *Circular*’s consultation process, on November 21, 2018, Bragg sent notification packages to all residents located within a radius of three (3) times the height of the proposed tower and advertised in the local newspaper. Bragg invited comments from the public within 30 days. The applicants state they sent a letter expressing concerns to Bragg on November 27, 2018. Bragg has no record of having received that correspondence. The applicants submitted further communication through their solicitor on December 21, 2018, in which they expressed their concerns related to property values and health and safety issues. A representative of Bragg called the applicants’ solicitor that same day. He explained that the applicants’ concerns were not relevant pursuant to the *Circular*. The representative of Bragg maintained no record of the conversation. Bragg followed up on this conversation with a letter dated January 3, 2019. Bragg contends the January 3, 2019 letter constitutes both the acknowledgement of the applicants’ concerns in writing required within 14 days and the response to their concerns required within 60

days, as contemplated by step 2 of the consultation process set out in the *Circular*. For ease of reference, set out below is the text of the letter sent to the applicants' solicitor by Bragg:

Dear Mr. Thompson,

Thank you for reaching out to share your concerns about the proposed site located at Zack Road in Lutes Mountain, NB.

We are currently in the midst of what is considered the public notification process, which is meant to capture community feedback like yours before we make any final decisions. With that in mind, please know that we take your concerns very seriously. We work hard to find tower site locations that provide excellent coverage for the community while minimizing any impacts to the communities we serve including minimizing the number of locations required to serve a community.

The proposed structure, a 45m monopole tower, is one of the smaller and less aesthetically impacting tower designs.

Reliable telecommunications infrastructure can be an influencing factor for homebuyers and it is common for residential developments to be in close proximity to telecommunications infrastructure.

The property at 9 Zack Road was considered as a potential location for the installation of a new telecommunications tower, however upon further due diligence it was determine (sic) that a telecommunications tower at that location would not achieve the coverage objective for the area.

Regards,

[9] The January 3 letter does not appear to identify which comments, questions or concerns raised by the applicants are considered by Bragg to be reasonable and relevant. Even if Bragg considered some of them to be reasonable and relevant, which is unclear, the letter does not address those concerns as required by step 2 of the consultation process set out in the *Circular*. Finally, the January 3 letter does not inform the applicants they have 21 days within which to

reply, also required by step 2 of the consultation process. Bragg, not surprisingly, received no further communication from the applicants or their solicitor.

[10] Via e-mail correspondence dated February 20, 2019, SRSC confirmed to Bragg that it (Bragg) had completed the public consultation requirements set out in the *Circular*. It further informed Bragg it would issue a letter of concurrence once its Planning Review and Adjustment Committee (“the Committee”) approved the subdivision of the lot required for the placement of the tower. On February 27, 2019, the Committee approved Bragg’s zoning variance application and subdivision plan. This paved the way for the issuance of the concurrence letter from SRSC and ISED’s eventual approval for the installation of the antenna.

[11] On March 5, 2019, the applicants wrote to ISED to communicate their concerns about the failure of the consultation process. On March 12, 2019, the SRSC issued Bragg a certificate of concurrence, as contemplated by section 4.3 of the *Circular*. On March 14, 2019, ISED replied to the applicants’ letter dated March 5, 2019 to advise them that it was satisfied Bragg had fulfilled the requirements of the *Circular*. The applicants challenge the issuance of the certificate of concurrence and the conclusion by ISED that Bragg had fulfilled the requirements of the *Circular*.

#### IV. Relevant Provisions

[12] The relevant provisions are s. 5(1)(f) of the *Radiocommunication Act*, RSC 1985, c R-2, as well as ss. 1.1, 1.3, 4, 4.2, 4.3, and 7 of the *Circular* as set out in the attached Schedule.

## V. Issues

[13] The applicants contend Bragg and/or ISED failed to respect the *Circular*'s consultation process thereby violating their (the applicants') procedural fairness rights. While not specifically contending in their Notice of Application that ISED's decision fails to meet the standard of reasonableness, the applicants state that ISED "[...] utterly failed to, or otherwise refused to consider the neighbors complaints, comments, and/or concerns and for all intents and purposes entirely ignored and/or disregarded their voices" I consider those pleadings to constitute an allegation that the decision does not meet the test of reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, 441 DLR (4th) 1 [*Vavilov*]. In addition, the applicants contend ISED improperly delegated its authority to the SRSC. Because I am satisfied that this Application may be determined based upon either the procedural fairness issue or that of reasonableness, I need not address the issue of alleged improper delegation.

## VI. Analysis

[14] Paragraph 5(1)(f) of the *Radiocommunication Act* authorizes the Minister to approve each site on which radio apparatus, including antenna systems, may be located, and approve the erection of all masts, towers and other antenna-supporting structures. Those who wish to erect antennae pursuant to the *Act* must meet the requirements of the *Circular*. The importance of respecting those requirements is particularly evident in a case such as the present where the application to erect a tower and the consultation process are proponent-driven.

[15] Where the executive branch establishes a procedure for obtaining regulatory approval, I am of the view failure to follow that procedure, where the failure is not *de minimis*, constitutes a breach of procedural fairness (*Mavi v Canada (Attorney General)*, 2011 SCC 30 at para 68, [2011] 2 SCR 504; *Khadr v Canada (Attorney General)*, 2006 FC 727 at para 119, 268 DLR (4th) 303; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 26, 174 DLR (4th) 193 [*Baker*]). While the degree of procedural fairness necessary in any given circumstance might otherwise depend upon the nature of the tribunal, the importance of the decision to the individual affected and the legitimate expectations of the persons involved, (*Baker*), here ISED has chosen a process that, in my view, constitutes the minimum degree of procedural fairness proponents must meet. The applicants do not contend the consultation process set out in the *Circular* is procedurally unfair; rather, they say Bragg's failure to follow the procedure was unfair and led to an unreasonable decision in the circumstances. I agree. I note the following:

- a) First, it appears that Bragg failed to acknowledge receipt of the November 27, 2018 letter sent by the applicants. This violated step 1 of the "Responding to the Public" component of the consultation process as outlined at section 4.2 of the *Circular*.
- b) Second, presuming without deciding, that Bragg did not receive the November 27, 2018 letter, Bragg failed to maintain a record of its employee's phone conversation with the applicants' counsel of December 21, 2018, in which the employee verbally acknowledged receipt of the applicants' concerns set out in the letter of the same date. This failure violated step 1 of the "Responding to the Public" component of the consultation process outlined at section 4.2 of the *Circular*. Although the *Circular* states that the letter required by step 2 may constitute a record of how the proponent addressed



the concerns, the January 3, 2019 does not address the comments, questions or concerns, nor does it purport to say they are neither “reasonable” nor “relevant”. In addition to failing to maintain a written record of the telephone communication between Bragg and counsel for the applicants, there was no evidence of any other effort to maintain a record in any other format, such as an audio recording.

- c) Third, presuming the first letter received by Bragg was the letter of December 21, 2018, and presuming the January 3, 2019 letter from Bragg to the applicants’ counsel constitutes both the 14-day acknowledgement and the 60-day response, the January 3, 2019 letter fails to meet the procedural requirements set out in the *Circular*. Bragg neither addressed the applicants’ concerns nor explained why they were not relevant or reasonable. In addition, it failed to clearly indicate to the applicants that they had 21 days within which to respond to the correspondence.

[16] Bragg contends the failure to alert the applicants to the 21-day period within which to respond is inconsequential because counsel for the applicants knew of that time limit by having read the *Circular*. I disagree for three (3) reasons. First, the *Circular* requires the proponent to clearly indicate the 21-day reply period to the receiving party. Second, because the January 3, 2019 letter is dated within 14 days of Bragg’s receipt of the December 21, 2018 letter from the applicants’ counsel, and because it fails to mention the 21-day response time, the applicants could reasonably expect that that letter was nothing more than the 14-day acknowledgement. The applicants could have reasonably expected further correspondence based upon the 60-day time period. In my view, this clearly explains the applicants’ failure to respond within 21 days of the January 3 letter. Third, the *Circular* provides that a proponent is required to “address in writing

all reasonable and relevant concerns within 60 days of receipt or explain why the question, comment or concern is not, in the view of the proponent, reasonable or relevant”. As already stated, in my view, the January 3 letter does neither.

[17] It is evident ISED failed to review the communications between the parties. Had it done so, it would have been apparent that no record, either written or audio, was maintained of the December 21, 2018 telephone conversation between a Bragg official and counsel for the applicants. Furthermore, had it reviewed the communications between Bragg and the applicants, ISED would have realized the applicants were never advised of their right to respond to the January 3, 2019 letter from Bragg within 21 days. Also, for the reasons already provided, it would have been evident that the January 3, 2019 letter could not be both the 14-day acknowledgement and the 60-day response from Bragg.

[18] Bragg cites *Parveen v Canada (Citizenship and Immigration)*, 2019 FC 155, in support of the principle that failure to follow strict procedural requirements should not invalidate an otherwise valid decision. In that case, this Court upheld a decision by the Refugee Protection Division (“RPD”) despite the RPD’s failure to provide written reasons for its decision in accordance with the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The RPD had communicated its decision orally, rather than in writing, as required by the *IRPA*. This Court concluded there was no breach of procedural fairness. In contrast to the facts in *Parveen*, the missing procedural steps in the present case are those necessary to arrive at a fair decision. In *Parveen*, the issue was the method of communicating a decision already made through a fair

procedure. The violations by Bragg and/or ISED of the procedure set out in the *Circular* are not merely technical, nor are they *de minimis*.

[19] I conclude that Bragg's consultation efforts failed to meet the requirements of procedural fairness. Furthermore, ISED's decision that Bragg successfully concluded the consultation process is unreasonable in the circumstances. It is not transparent, intelligible and justifiable in the circumstances: *Vavilov*, at para 15).

## VII. Conclusion

[20] Given my conclusion that Bragg failed to respect the procedural fairness requirements of the *Circular* and ISED's unreasonable decision that the consultation process was successfully completed, I allow the Application for Judicial Review. By allowing this Application, it is apparent that I consider ISED unreasonably relied upon SRSC's advice that Bragg had successfully completed the consultation process.

[21] Bragg and ISED both pled that Bragg should not be required to commence the siting application process *de novo*. I disagree. In the circumstances, the only part of the consultation process that appears to have been respected was that involving public notification. The Court has no knowledge about whether other individuals may have moved to within three (3) times the height of the proposed tower since these proceedings commenced. To dispense with the requirement of notification anew may result in the failure to respect the rights of other interested parties.

[22] All of that said, in my view it is not necessary for Bragg to seek a new variance and subdivision approval from SRSC under the *Community Planning Act*, SNB 2017, c 19. The provincial planning authorities have approved a subdivision. This court has no jurisdiction to interfere in that process.

[23] Presuming Bragg wishes to proceed with approval for the erection of a tower on PID 70387071, Zack Road, Lutes Mountain, New Brunswick, nothing in these reasons or this Judgment prevent it from commencing the process anew beginning with notification as contemplated by the *Circular*.

#### VIII. Varia

[24] At the commencement of the hearing, the parties agreed that the respondent EASTLINK TELECOMMUNICATIONS COMPANY should be amended to read “BRAGG COMMUNICATIONS INC” and the defendant “THE MINISTER FOR INDUSTRY CANADA, or INNOVATION SCIENCE AND ECONOMIC DEVELOPMENT” should be amended to read “THE ATTORNEY GENERAL OF CANADA”.

[25] Given the parties’ agreement in this regard, and as part of this judgment, the style of cause of the pleadings is amended accordingly.

**JUDGMENT**

**THIS COURT’S JUDGMENT is that:**

1. The style of cause is amended to reflect that the defendant EASTLINK TELECOMMUNICATIONSCOMPANY is now “BRAGG COMMUNICATIONS INC”, and that the defendant “THE MINISTER FOR INDUSTRY CANADA, or INNOVATION SCIENCE AND ECONOMIC DEVELOPMENT” is now “THE ATTORNEY GENERAL OF CANADA”;
2. The Application for Judicial Review is allowed; and
3. ISED’s decision dated the 14<sup>th</sup> day of March, 2019 that the consultation process contemplated by the *Circular* was complete is quashed.

\_\_\_\_\_  
"B. Richard Bell"

Judge

## SCHEDULE

<p><b><i>Radiocommunication Act, RSC 1985, c R-2</i></b></p>	<p><b><i>Loi sur la radiocommunication, LRC 1985, ch R-2</i></b></p>
<p><b>Minister's powers</b></p>	<p><b>Pouvoirs ministériels</b></p>
<p><b>5 (1)</b> Subject to any regulations made under section 6, the Minister may, taking into account all matters that the Minister considers relevant for ensuring the orderly establishment or modification of radio stations and the orderly development and efficient operation of radiocommunication in Canada,</p>	<p><b>5 (1)</b> Sous réserve de tout règlement pris en application de l'article 6, le ministre peut, compte tenu des questions qu'il juge pertinentes afin d'assurer la constitution ou les modifications ordonnées de stations de radiocommunication ainsi que le développement ordonné et l'exploitation efficace de la radiocommunication au Canada :</p>
<p style="padding-left: 40px;"><b>(f)</b> approve each site on which radio apparatus, including antenna systems, may be located, and approve the erection of all masts, towers and other antenna-supporting structures;</p>	<p style="padding-left: 40px;"><b>f)</b> approuver l'emplacement d'appareils radio, y compris de systèmes d'antennes, ainsi que la construction de pylônes, tours et autres structures porteuses d'antennes;</p>
<p><b>CPC-2-0-03, Radiocommunication and Broadcasting Antenna Systems</b></p>	<p><b>CPC-2-0-03 — Systèmes d'antennes de radiocommunications et de radiodiffusion</b></p>
<p><b>1.1 Mandate</b></p>	<p><b>1.1 Mandat</b></p>
<p>Section 5 of the <i>Radiocommunication Act</i> states that the Minister may, taking into account all matters the Minister considers relevant for ensuring the orderly development and efficient operation of radiocommunication in Canada, issue radio authorizations and</p>	<p>L'article 5 de la <i>Loi sur la radiocommunication</i> établit que le Ministre peut, compte tenu des questions qu'il juge pertinentes pour le développement ordonné et l'exploitation efficace de la radiocommunication au Canada, délivrer des autorisations radio et</p>

approve each site on which radio apparatus, including antenna systems, may be located. Further, the Minister may approve the erection of all masts, towers and other antenna-supporting structures. Accordingly, proponents must follow the process outlined in this document when installing or modifying an antenna system. Also, the installation of an antenna system or the operation of a currently existing antenna system that is not in accordance with this process may result in its alteration or removal and other sanctions against the operator in accordance with the *Radiocommunication Act*.

[...]

### 1.3 Process Overview

This document outlines the process that must be followed by proponents seeking to install or modify antenna systems. The broad elements of the process are as follows:

1. Investigating sharing or using existing infrastructure before proposing new antenna-supporting structures.
2. Contacting the land-use authority (LUA) to determine local requirements regarding

approuver chaque emplacement d'appareils radio, y compris de systèmes d'antennes, ainsi que la construction de pylônes, tours et autres structures porteuses d'antennes. Par conséquent, le promoteur a la responsabilité de suivre le processus énoncé dans le présent document au moment d'installer ou de modifier un système d'antennes. De plus, l'installation ou l'exploitation d'un système d'antennes existant qui déroge du présent processus pourrait entraîner sa modification ou sa suppression et toute autre sanction contre l'exploitant en vertu de la *Loi sur la radiocommunication*.

[...]

### 1.3 Aperçu du processus

Le présent document définit le processus à suivre par le promoteur pour installer ou modifier des systèmes d'antennes. Ce processus comprend les principaux éléments suivants :

1. Étudier le partage ou l'utilisation d'une infrastructure en place avant de proposer de nouvelles structures porteuses d'antennes.
2. Communiquer avec l'autorité responsable de l'utilisation du sol pour déterminer les

antenna systems

exigences locales  
relatives aux systèmes  
d'antennes.

- |   |  |
|---|--|
| <p>3. Undertaking public notification and addressing relevant concerns, whether by following local LUA requirements or Industry Canada's default process, as is required and appropriate.</p> | <p>3. Notifier le public et répondre aux préoccupations pertinentes, conformément aux exigences locales de l'autorité responsable de l'utilisation du sol ou au processus par défaut d'Industrie Canada, selon ce qui est requis et approprié.</p> |
| <p>4. Satisfying Industry Canada's general and technical requirements.</p>  | <p>4. Respecter les exigences générales et techniques d'Industrie Canada.</p>  |
| <p>5. Completing the construction.</p>  | <p>5. Achever la construction.</p>   |

It is Industry Canada's expectation that steps (2) to (4) will normally be completed within *120 days*. Some proposals may be excluded from certain elements of the process (see Section 6). It is Industry Canada's expectation that all parties will carry out their roles and responsibilities in good faith and in a manner that respects the spirit of this document. If the requirements of this document are satisfied and the proposal proceeds then, under step (5), construction of the antenna system must be completed within three years of conclusion of consultation.

Industrie Canada estime que les étapes (2) à (4) seront normalement exécutées dans un délai de 120 jours. Il est possible que des propositions soient dispensées de certains éléments du processus (voir section 6). Le Ministère s'attend à ce que toutes les parties s'acquittent de leurs rôles et responsabilités de bonne foi en respectant l'esprit du présent document. Si les exigences de ce document sont remplies et que la proposition va de l'avant, sous l'étape (5), la construction de l'installation d'antenne doit être achevée dans trois ans suivant la conclusion de la consultation.



[...]

#### **4. Land-use Authority and Public Consultation**

##### **Contacting the Land-use Authority**

Proponents must always contact the applicable land-use authorities to determine the local consultation requirements and to discuss local preferences regarding antenna system siting and/or design, unless their proposal falls within the exclusion criteria outlined in Section 6. If the land-use authority has designated an official to deal with antenna systems, then proponents are to engage the authority through that person. If not, proponents must submit their plans directly to the council, elected local official or executive. The 120-day consultation period commences only once proponents have formally submitted, in writing, all plans required by the land-use authority, and does not include preliminary discussions with land-use authority representatives.

[...]

#### **4. Consultation des autorités responsables de l'utilisation du sol, et du public**

##### **Communication avec l'autorité responsable de l'utilisation du sol**

Les promoteurs sont toujours tenus de communiquer avec les autorités responsables de l'utilisation du sol concernées afin de déterminer les exigences de consultations locales et de discuter des préférences locales concernant l'emplacement ou la conception du système d'antennes, à moins que leur proposition réponde aux critères d'exclusion décrits à la section 6. Si l'autorité responsable de l'utilisation du sol a désigné un agent responsable des systèmes d'antennes, les promoteurs s'adresseront alors à l'autorité par l'entremise de cette personne. En l'absence d'un responsable désigné, les promoteurs sont tenus de présenter leurs plans directement au conseil, aux représentants élus ou aux administrateurs exécutifs locaux. La période de consultation de 120 jours commence seulement lorsque les promoteurs ont officiellement présenté par écrit tous les plans exigés par l'autorité responsable de l'utilisation du sol. Elle ne comprend pas les discussions

préliminaires avec les représentants de l'autorité responsable de l'utilisation du sol.

Proponents should note that there may be more than one land-use authority with an interest in the proposal. Where no established agreement exists between such land-use authorities, proponents must, as a minimum, contact the land-use authority(ies) and/or neighbouring land-use authorities located within a radius of three times the tower height, measured from the tower base or the outside perimeter of the supporting structure, whichever is greater. As well, in cases where proponents are aware that a potential Aboriginal or treaty right or land claim may be affected by the proposed installation,<sup>Footnote5</sup> they must contact Industry Canada in order to ensure that the requirements for consultation are met.

Les promoteurs prendront note que leurs propositions peuvent intéresser plus d'une autorité responsable de l'utilisation du sol. En l'absence d'une entente entre de telles autorités responsables de l'utilisation du sol, ils doivent à tout le moins communiquer avec l'autorité ou les autorités responsables de l'utilisation du sol ou avec les autorités responsables de l'utilisation du sol situées dans un rayon de trois fois la hauteur du pylône, mesurée à la base du pylône ou à partir du périmètre extérieur du bâti, la distance la plus grande étant applicable. Aussi, lorsque les promoteurs savent que les installations proposées peuvent soulever des revendications territoriales de la part d'un groupe autochtone<sup>Note de bas de page5</sup>, ils doivent communiquer avec Industrie Canada pour s'assurer que les consultations soient menées selon toutes les exigences.

### **Following the Land-use Authority Process**

Proponents must follow the land-use consultation process for the siting of antenna systems, established by the land-use authority, where one exists.

### **Respect du processus de consultation des autorités responsables de l'utilisation du sol**

Les promoteurs sont tenus de respecter le processus de consultation établi par l'autorité responsable de l'utilisation du sol pour

In the event that a land-use authority's existing process has no public consultation requirement, proponents must then fulfill the public consultation requirements contained in Industry Canada's Default Public Consultation Process (see Section 4.2). Proponents are not required to follow this requirement if the LUA's established process explicitly excludes their type of proposal from consultation or it is excluded by Industry Canada's criteria.<sup>Footnote6</sup> Where proponents believe the local consultation requirements are unreasonable, they may contact the local Industry Canada office in writing for guidance.

l'emplacement des systèmes d'antennes, lorsqu'un tel processus existe déjà. Si le processus existant de l'autorité responsable de l'utilisation du sol ne contient pas une exigence de consultation publique, les promoteurs doivent alors respecter le processus de consultation publique par défaut d'Industrie Canada (voir la section 4.2). Les promoteurs ne sont pas dans l'obligation d'adhérer à cette exigence si leur type de proposition est explicitement dispensée par le processus établi par les autorités responsables de l'utilisation du sol ou par l'un des critères d'Industrie Canada<sup>Note de bas de page6</sup>. Lorsque les promoteurs jugent déraisonnables les exigences de consultation locale, ils peuvent communiquer par écrit avec le bureau local d'Industrie Canada pour obtenir des instructions supplémentaires.

### **Broadcasting Undertakings**

Applicants for broadcasting undertakings are subject to Canadian Radio-television and Telecommunications (CRTC) licensing processes in addition to Industry Canada requirements. Although Industry Canada encourages applicants to consult as early as practical in the application process, in some cases it may not be prudent for the applicants to initiate public and municipal/land-use consultation before

### **Entreprises de radiodiffusion**

Outre les exigences d'Industrie Canada, les demandes d'entreprises de radiodiffusion doivent respecter le processus de délivrance de licences du Conseil de la radiodiffusion et des télécommunications canadiennes (CRTC). Même si Industrie Canada encourage les requérants à mener des consultations le plus tôt possible dans le processus de demande, dans certains cas, il pourrait s'avérer imprudent

receiving CRTC approval, as application denial by the CRTC would have result in unnecessary work for all parties involved. Therefore, assuming that the proposal is not otherwise excluded, broadcasting applicants may opt to commence land-use consultation after having received CRTC approval. However, broadcasting applicants choosing this approach are required, at the time of the CRTC application, to notify the land-use authority with a Letter of Intent outlining a commitment to conduct consultation after receiving CRTC approval. If the land-use authority raises concerns with the proposal as described in the Letter of Intent, applicants are encouraged to engage in discussions with the land-use authority regarding their concerns and attempt to resolve any issues. Refer to Broadcasting Procedures and Rules, Part 1 (BPR-1), for further details.

pour les requérants d'initier une consultation publique et municipale ou une consultation des autorités responsables de l'utilisation du sol avant de recevoir l'approbation du CRTC, car le refus de la demande par le CRTC occasionnerait du travail inutile pour toutes les parties concernées. Par conséquent, en supposant que la proposition n'est pas autrement exclue, les requérants pour une licence de radiodiffusion peuvent choisir d'initier le processus de consultation auprès des autorités responsables de l'utilisation du sol une fois leur demande approuvée par le CRTC. Toutefois, les requérants qui choisissent cette option sont tenus, au moment de présenter leur demande au CRTC, de notifier l'autorité responsable de l'utilisation du sol par le biais d'une lettre d'intention dans laquelle ils indiqueront leur engagement à mener la consultation après avoir reçu l'approbation du CRTC. Si l'autorité responsable de l'utilisation du sol soulève des préoccupations au sujet de la proposition telle que décrite dans la lettre d'intention, les requérants sont encouragés à engager des discussions avec l'autorité responsable de l'utilisation du sol afin de dissiper les doutes et tenter de résoudre les litiges.

*Voir Règles et procédures sur la radiodiffusion, Partie*

I (RPR) pour plus de détails.

[...]

[...]

#### **4.2 Industry Canada's Default Public Consultation Process**

#### **4.2 Processus de consultation publique par défaut d'Industrie Canada**

Proponents must follow Industry Canada's Default Public Consultation Process where the local land-use authority does not have an established and documented public consultation process applicable to antenna siting. Industry Canada's default process has three steps whereby the proponent:

Lorsque l'autorité responsable de l'utilisation du sol n'a pas établi et documenté un processus de consultation publique applicable à l'emplacement d'antennes, les promoteurs sont tenus de respecter le processus par défaut d'Industrie Canada. Le processus d'Industrie Canada comprend trois étapes. Le promoteur se doit de :

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| <ol style="list-style-type: none"> <li>1. provides written notification to the public, the land-use authority and Industry Canada of the proposed antenna system installation or modification (i.e. <i>public notification</i>);</li> <li>2. engages the public and the land-use authority in order to address relevant questions, comments and concerns regarding the proposal (i.e. <i>responding to the public</i>); and</li> <li>3. provides an opportunity to the public and the</li> </ol> | <ol style="list-style-type: none"> <li>1. notifier, par écrit, le public, l'autorité responsable de l'utilisation du sol et Industrie Canada de l'installation ou de la modification du système d'antennes proposé (<i>notification du public</i>);</li> <li>2. solliciter la participation du public et de l'autorité responsable de l'utilisation du sol afin de répondre aux questions, observations et préoccupations pertinentes touchant la proposition (<i>réponse aux observations du public</i>);</li> <li>3. donner au public et à l'autorité responsable</li> </ol> |
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land-use authority to formally respond in writing to the proponent regarding measures taken to address reasonable and relevant concerns (i.e. *public reply comment*).

de l'utilisation du sol la possibilité de répondre officiellement par écrit au promoteur en ce qui concerne les mesures prises pour répondre aux préoccupations raisonnables et pertinentes (*réponse du public aux mesures entreprises*).

### **Public Notification**

1. Proponents must ensure that the local public, the land-use authority and Industry Canada are notified of the proposed antenna system. As a minimum, proponents must provide a notification package (see Appendix 1) to the local public (including nearby residences, community gathering areas, public institutions, schools, etc.), neighbouring land-use authorities, businesses, and property owners, etc. located within a radius of three times the tower height.<sup>Footnote8</sup> The radius is measured from the outside perimeter of the supporting structure. For the purpose of this requirement, the outside perimeter begins at the furthest point of the supporting mechanism, be it the outermost guy line, building edge, face of the self-supporting tower, etc. Public notification of an upcoming consultation must be clearly marked, making reference to the proposed antenna system, so that it is not misinterpreted as junk mail. The notice must be sent by mail or

### **Notification du public :**

1. Les promoteurs doivent s'assurer qu'avis est donné au public local, aux autorités responsables de l'utilisation du sol et à Industrie Canada. À titre d'exigence minimale, ils doivent fournir un dossier de notification (voir l'annexe 1) au public local (résidences avoisinantes, centres de rencontres communautaires, établissements publics, écoles, etc.), aux autorités responsables de l'utilisation du sol et aux entreprises et propriétaires de terrains situés dans un rayon de trois fois la hauteur du pylône<sup>Footnote8</sup>, calculée à partir de la base du pylône ou du périmètre extérieur de la structure porteuse d'antennes, la distance la plus grande étant applicable. Aux fins de cette exigence, le périmètre extérieur commence au point le plus éloigné du moyen de fixation, par exemple un hauban extérieur, le bord d'un bâtiment, le devant d'un pylône autoportant, etc. Lorsqu'une consultation à venir doit faire l'objet d'une

be hand delivered. The face of the package must clearly reference that the recipient is within the prescribed notification radius of the proposed antenna system.

notification publique, il est nécessaire d'indiquer clairement l'objet de la notification, en mentionnant le système d'antennes proposé, afin d'éliminer le risque que le message soit interprété comme étant du courrier indésirable. La notification doit être envoyée par courrier ordinaire ou par porteur. Au recto de l'enveloppe, il doit être clairement indiqué que le destinataire réside à l'intérieur du rayon de notification prescrit pour le système d'antennes proposé.

2. It is the proponent's responsibility to ensure that the notification provides at least 30 days for written public comment.

2. Le promoteur doit allouer au moins 30 jours au public pour répondre par écrit à l'avis.

3. In addition to the minimum notification distance noted above, in areas of seasonal residence, the proponent, in consultation with the land-use authority, is responsible for determining the best manner to notify such residents to ensure their engagement.

3. En plus des exigences mentionnées plus haut concernant la distance, dans les régions de villégiature, le promoteur, en consultation avec les autorités locales responsables de l'utilisation du sol, a la responsabilité de choisir la meilleure façon d'aviser les propriétaires afin d'assurer leur participation au processus.

4. In addition to the public notification requirements noted above, proponents of an antenna system proposed to be 30 metres or more in height must place a notice in a local community newspaper circulating in the proposed area.<sup>Footnote<sup>9</sup></sup> Height is measured from the lowest ground level at

4. Outre les exigences de notification publique indiquées ci-dessus, les promoteurs proposant des bâtis d'antennes d'une hauteur suggérée de 30 mètres ou plus doivent publier un avis dans un journal local communautaire distribué dans la région proposée.<sup>Note de bas de page<sup>9</sup></sup> La hauteur est calculée à

the base, including the foundation, to the tallest point of the antenna system. Depending on the particular installation, the tallest point may be an antenna, lightning rod, aviation obstruction lighting or some other appurtenance. Any attempt to artificially reduce the height (addition of soil, aggregate, etc.) will not be included in the calculation or measurement of the height of the antenna system.

partir du niveau le plus près du sol, à la base du bâti, en incluant la fondation, jusqu'au point supérieur du bâti. Selon l'installation particulière, le point le plus haut peut être une antenne, une tige de paratonnerre, un dispositif d'éclairage d'obstruction de l'aviation ou un autre accessoire. Toute tentative de réduire artificiellement la hauteur (ajout de terre, d'agrégats, etc.) ne sera pas incluse dans le calcul ou la mesure de la hauteur du système d'antennes.

### **Responding to the Public**

Proponents are to address all reasonable and relevant concerns, make all reasonable efforts to resolve them in a mutually acceptable manner and must keep a record of all associated communications. If the local public or land-use authority raises a question, comment or concern relating to the antenna system as a result of the public notification process, then the proponent is required to:

1. respond to the party in writing within *14 days* acknowledging receipt of the question, comment or concern and keep a record of the communication;

### **Réponse aux observations du public**

Les promoteurs répondront à toutes les préoccupations raisonnables et pertinentes, déploieront tous les efforts raisonnables pour les résoudre d'une manière mutuellement acceptable et conserveront un registre de toutes les communications afférentes. Si le processus de notification du public donne lieu à des questions, à des observations ou à des préoccupations du public local ou de l'autorité responsable de l'utilisation du sol relativement au système d'antennes, le promoteur doit :

1. accuser réception par écrit de ces questions, observations ou préoccupations dans un délai de 14 jours et tenir un registre de la communication;



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| <p>2. address in writing all reasonable and relevant concerns within <i>60 days</i> of receipt or explain why the question, comment or concern is not, in the view of the proponent, reasonable or relevant; and</p>  | <p>2. répondre par écrit à toutes les préoccupations raisonnables et pertinentes dans les 60 jours de la réception ou expliquer pourquoi la question, l'observation ou la préoccupation n'est pas jugée raisonnable ou pertinente du point de vue du promoteur;</p>   |
| <p>3. in the written communication referred to in the preceding point, clearly indicate that the party has <i>21 days</i> from the date of the correspondence to reply to the proponent's response. The proponent must provide a copy of all public reply comments to the local Industry Canada office.</p> | <p>3. dans la communication écrite mentionnée à l'étape 2 ci-dessus, indiquer clairement que l'autre partie a 21 jours à compter de la date de correspondance pour répondre au promoteur. Le promoteur doit fournir une copie de tous les commentaires sur la réponse du public au bureau local d'Industrie Canada.</p> |

Responding to reasonable and relevant concerns may include contacting a party by telephone, engaging in a community meeting or having an informal, personal discussion. Between steps 1 and 2 above, the proponent is expected to engage the public in a manner it deems most appropriate. Therefore, the letter at step 2 above may be a record of how the proponent and the other party addressed the concern at hand.

Le promoteur peut aussi répondre aux préoccupations raisonnables et pertinentes par téléphone, ou lors de rencontres communautaires ou de discussions personnelles informelles. Entre les étapes 1 et 2 ci-dessus, on s'attend à ce qu'il assure la participation du public de la manière qu'il juge la plus appropriée. Par conséquent, la communication de l'étape 2 ci-dessus peut faire état des mesures prises par le promoteur et l'autre partie pour répondre aux préoccupations

exprimées.

### **Public Reply Comments**

As indicated in step 3 above, the proponent must clearly indicate that the party has *21 days* from the date of the correspondence to reply to the response. The proponent must also keep a record of all correspondence/discussions that occurred within the *21-day* public reply comment period. This includes records of any agreements that may have been reached and/or any concerns that remain outstanding.

The factors that will determine whether a concern is reasonable or relevant according to this process will vary but will generally be considered if they relate to the requirements of this document and to the particular amenities or important characteristics of the area surrounding the proposed antenna system. Examples of concerns that proponents are to address may include:

- Why is the use of an existing antenna system or structure not possible?
- Why is an alternate site not possible?

### **Commentaires du public sur les réponses**

Tel qu'indiqué à l'étape 3 ci-dessus, le promoteur doit clairement indiquer que l'autre partie dispose de 21 jours à partir de la date de correspondance pour donner suite à la réponse. Le promoteur doit également conserver un registre complet de la correspondance et des discussions tenues dans les 21 jours alloués au public pour commenter la réponse (y compris toute entente conclue et/ou préoccupation non résolue).

Les facteurs déterminant si une préoccupation est raisonnable ou pertinente selon le présent processus varient, mais doivent généralement être liés aux exigences du présent document et aux particularités et caractéristiques importantes des lieux voisins de l'emplacement du système d'antennes projeté. Le promoteur doit aussi répondre à toutes les préoccupations raisonnables et pertinentes et tenir un registre de toutes les communications associées, par exemple :

- Pourquoi ne pas utiliser un système d'antennes existant?
- Pourquoi ne pas choisir un autre emplacement?

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| <ul style="list-style-type: none"> <li>• What is the proponent doing to ensure that the antenna system is not accessible to the general public?</li> <li>• How is the proponent trying to integrate the antenna into the local surroundings?</li> <li>• What options are available to satisfy aeronautical obstruction marking requirements at this site?</li> <li>• What are the steps the proponent took to ensure compliance with the general requirements of this document including the <i>Canadian Environmental Assessment Act (CEAA)</i>, Safety Code 6, etc.?</li> </ul> | <ul style="list-style-type: none"> <li>• Par quels moyens le promoteur empêchera-t-il le grand public d'avoir accès au système d'antennes?</li> <li>• Comment le promoteur s'y prendra-t-il pour que l'antenne s'intègre bien à l'environnement de la localité?</li> <li>• De quelles ressources dispose-t-on pour satisfaire aux exigences de balisage d'obstacle aérien à cet emplacement?</li> <li>• Quelles mesures le promoteur a-t-il prises pour respecter les exigences générales du présent document, de même que la <i>Loi canadienne sur l'évaluation environnementale</i>, le Code de sécurité 6, etc.?</li> </ul> |
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Concerns that are not relevant include:

- disputes with members of the public relating to the proponent's service, but unrelated to antenna installations;
- potential effects that a proposed antenna system will have on property values or municipal

Les préoccupations non pertinentes incluent les suivantes :

- Différends touchant les services offerts par le promoteur, mais sans rapport avec les installations d'antennes proposées.
- Répercussions possibles d'un système d'antennes proposé sur la valeur des propriétés ou les taxes

taxes;

- questions whether the *Radiocommunication Act*, this document, Safety Code 6, locally established by-laws, other legislation, procedures or processes are valid or should be reformed in some manner.

### 4.3 Concluding Consultation

The proponent may only commence installation/modification of an antenna system after the consultation process has been completed by the land-use authority, or Industry Canada confirms concurrence with the consultation portion of this process, and after all other requirements under this process have been met. Consultation responsibilities will normally be considered complete when the proponent has:

1. concluded consultation requirements (Section 4.1) with the land-use authority;
2. carried out public consultation either through the process established by the land-use authority or Industry Canada's Default Public

municipales.

- Remise en question de la validité de la *Loi sur la radiocommunication*, du présent document, du Code de sécurité 6, des règlements locaux ou d'autres lois, procédures ou processus.

### 4.3 Achèvement de la consultation

Le promoteur entreprendra l'installation ou la modification d'un système d'antennes uniquement lorsque le processus de consultation aura été complété par l'autorité responsable de l'utilisation du sol, ou lorsqu'Industrie Canada aura confirmé son approbation de la phase de consultation décrite dans le présent processus, et lorsque toutes les autres exigences de ce même processus auront été remplies. Le promoteur se sera normalement acquitté de ses obligations en matière de consultation lorsqu'il aura :

1. respecté les exigences de consultation (section 4.1) avec l'autorité responsable de l'utilisation du sol;
2. effectué la consultation publique selon le processus établi par l'autorité responsable de l'utilisation du sol, ou selon le processus

Consultation Process  
where required; and

de consultation  
publique par défaut  
d'Industrie Canada;

3. addressed all reasonable  
and relevant concerns.

3. répondu à toutes les  
préoccupations  
raisonnables et  
pertinentes.

### **Concluding Land-use Authority Consultation**

### **Conclusion de la consultation des autorités responsables de l'utilisation du sol**

Industry Canada expects that land-use consultation will be completed within *120 days* from the proponent's initial formal contact with the local land-use authority. Where unavoidable delays may be encountered, the land-use authority is expected to indicate when the proponent can expect a response to the proposal. If the authority is not responsive, the proponent may contact Industry Canada. Depending on individual circumstances, Industry Canada may support additional time or consider the land-use authority consultation process concluded.

Industrie Canada prévoit que le processus de consultation des autorités responsables de l'utilisation du sol sera terminé dans les 120 jours après le premier contact officiel du promoteur avec l'autorité responsable de l'utilisation du sol. En cas de retard inévitable, il revient à l'autorité responsable de l'utilisation du sol de donner une indication au promoteur quant au délai auquel il devrait s'attendre. Si le promoteur n'obtient pas de réponse de la part de l'autorité responsable de l'utilisation du sol, il pourra alors s'adresser à Industrie Canada. Selon les circonstances, Industrie Canada prolongera les délais établis ou considérera la consultation comme terminée.

Depending on the land-use authority's own process, conclusion of local consultation may include such steps as obtaining final concurrence for the proposal via the relevant committee, a letter or report acknowledging that the relevant

Selon le processus propre à l'autorité responsable de l'utilisation du sol, l'aboutissement de la consultation nécessitera peut-être certaines étapes comme l'approbation finale de la proposition par le comité

municipal process or other requirements have been satisfied, or other valid indication, such as the minutes of a town council meeting indicating LUA approval. Compliance with informal city staff procedures, or grants of approval strictly related to zoning, construction, etc. will not normally be sufficient.

Industry Canada recognizes that approvals for construction (e.g. building permits) are used by some land-use authorities as evidence of consultation being concluded. Proponents should note that Industry Canada does not consider the fact a permit was issued as confirmation of concurrence, as different land-use authorities have different approaches. As such, Industry Canada will only consider such approvals as valid when the proponent can demonstrate that the LUA's process was followed and that the LUA's preferred method of concluding LUA consultation is through such an approval.

#### **Concluding Industry Canada's Default Public**

compétent, une lettre ou un rapport attestant que le processus municipal pertinent ou autres exigences applicables ont été respectés, ou d'autres données, p. ex. procès-verbal d'une réunion du conseil municipal attestant l'approbation de la proposition. En général, il ne suffira pas de se conformer aux procédures non officielles des représentants de la municipalité ou à un permis de zonage ou de construction.

Industrie Canada reconnaît que certaines autorités responsables de l'utilisation du sol se servent des approbations de construction (p. ex. permis de construire) comme preuves de conclusion favorable du processus de consultation. Les promoteurs noteront qu'Industrie Canada ne considère pas la délivrance d'un permis comme un gage de consultation favorablement conclue, puisque les règlements diffèrent d'une municipalité à l'autre. Aussi, Industrie Canada considérera ces approbations comme valides lorsque le promoteur pourra démontrer qu'il a respecté le processus de consultation des autorités responsables de l'utilisation du sol et que ce type d'approbation est privilégié comme indication de la conclusion de la consultation.

#### **Conclusion du processus de consultation publique par**

## Consultation Process

Industry Canada's Default Public Consultation Process will be considered concluded when the proponent has either:

- received no written questions, comments or concerns to the formal notification within the *30-day* public comment period; or
- if written questions, comments or concerns were received, the proponent has addressed and resolved all reasonable and relevant concerns and the public has not provided further comment within the *21-day* reply comment period.

In the case where the public responds within the *21-day* reply comment period, the proponent has the option of making further attempts to address the concern on its own, or can request Industry Canada engagement. If a request for engagement is made at this stage, Industry Canada will review the relevant material, request any further information it deems pertinent from any party and may then decide that:

## défaut d'Industrie Canada

Le processus de consultation publique par défaut d'Industrie Canada sera considéré comme terminé lorsque le promoteur :

- n'a reçu aucune question, observation ou préoccupation écrite du public au terme de la période de 30 jours prévue pour la présentation de ces observations; ou
- ayant abordé et réglé toutes les préoccupations raisonnables et pertinentes du public, n'a reçu aucune autre observation au terme de la période supplémentaire de 21 jours prévue pour les réponses du public sur les mesures prises.

Si le public répond à l'intérieur de la période de 21 jours prévue pour les commentaires sur les mesures prises, le promoteur a l'option de faire d'autres tentatives pour régler lui-même ladite préoccupation ou pour demander l'engagement d'Industrie Canada. Si une demande d'engagement est faite à ce stade-ci, Industrie Canada examinera le matériel pertinent, demandera à n'importe quelle des parties concernées, toute autre

information qu'il jugera appropriée et pourra alors décider que :

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| <ul style="list-style-type: none"> <li>• the proponent has met the consultation requirements of this process and that Industry Canada concurs that installation or modification may proceed; or</li> <li>• the parties should participate in further attempts to mitigate or resolve any outstanding concern.</li> </ul> | <ul style="list-style-type: none"> <li>• le promoteur satisfait aux exigences de consultation du présent processus et qu'Industrie Canada approuve que le promoteur commence les travaux d'installation ou de modification; ou</li> <li>• les parties devraient entreprendre d'autres initiatives pour corriger ou résoudre les problèmes qui persistent.</li> </ul> |
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[...]

## 7. General Requirements

In addition to roles and responsibilities for site sharing, land-use consultation and public consultation, proponents must also fulfill other important obligations including: compliance with Health Canada's Safety Code 6 guideline for the protection of the general public; compliance with radio frequency immunity criteria; notification of nearby broadcasting stations; environmental considerations; and Transport Canada/NAV CANADA aeronautical safety responsibilities.

[...]

## 7. Exigences générales

Outre les rôles et responsabilités reliés au partage d'emplacement et de consultation du public et des autorités responsables de l'utilisation du sol, les promoteurs sont tenus de respecter d'autres obligations importantes, soit : le respect du Code de sécurité 6 de Santé Canada visant la protection du grand public; la conformité aux critères d'immunité RF; la notification des stations de radiodiffusion à proximité; les considérations environnementales; et les exigences de sécurité aéronautique de Transports Canada/NAV CANADA.



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

**DOCKET:** T-600-19

**STYLE OF CAUSE:** ALEXANDR PETUKHOV, ZOHAR EL, DAN BRIGGS,  
AND MICHAEL PRATT v THE ATTORNEY GENERAL  
OF CANADA, SOUTHEAST REGIONAL SERVICE  
COMMISSION, BRAGG COMMUNICATIONS INC.  
AND TERRENCE LEBLANC AND SHARON  
LEBLANC

**PLACE OF HEARING:** FREDERICTON, NEW BRUNSWICK

**DATE OF HEARING:** FEBRUARY 26, 2020

**REASONS FOR JUDGMENT  
AND JUDGMENT:** BELL J.

**DATED:** MAY 6, 2020

**APPEARANCES:**

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