Federal Court		Cour fédérale

Date: 20091221

Docket: T-1823-09

Citation: 2009 FC 1297

Ottawa, Ontario, December 21, 2009

PRESENT: The Honourable Madam Justice Hansen

BETWEEN:

LENNARD LEVINE

Applicant

and

THE MINISTER OF INDUSTRY and
BRAGG COMMUNICATIONS INCORPORATED
doing business under the business name, EASTLINK

Respondents

REASONS FOR ORDER AND ORDER

[1] On October 15, 2009, the Minister of Industry approved the construction and operation of a broadband wireless internet tower (NSC312) at Victoria Harbour, Kings County, Nova Scotia. NSC312 is one of six towers that together will provide high-speed internet access to the county

pursuant to a Nova Scotia provincial government initiative to extend internet access to rural parts of the province. Construction of the tower has now been completed, however, it has not been "turned on". It is anticipated that it will be in operation by the end of December 2009.

[2] On November 4, 2009, the Applicant filed an application for judicial review of the October 15, 2009 decision seeking declaratory relief, an order setting aside the decision and other relief. The Applicant now seeks a stay of the decision until the judicial review is determined.

[3] It is well established that on a motion for a stay an applicant must satisfy the Court that there is a serious issue to be tried; the applicant will suffer irreparable harm if the relief sought is not granted; and the balance of convenience weighs in favour of granting the relief sought (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. As the determinative issue centres on irreparable harm, only the facts relevant to this issue are set out below.

[4] The Applicant owns 20 acres of land in Victoria Harbour, Kings County, Nova Scotia. It is adjacent to the land on which NSC312 is located. Since 1984, the Applicant has grown organic garlic on his land. The majority of his production is sold as seed, a quarter of his production is held for reseeding the following year, and the balance is sold for consumption. The Applicant states that over the years by careful selection of the best seed and by using the best organic farming practices, his product and the reputation of his product have developed to the point where he is known as being "the only reliable long term purveyor of high quality, local, organic garlic seed" in Atlantic Canada. In 1990, the Organic Crop Improvement Association granted the Applicant's garlic

operation organic certification. The Applicant states that he has not kept up his formal certification as it is no longer of benefit to him since his garlic has become recognized as an organic "pure" product. The Applicant's garlic growing operation is his only source of income.

[5] The Applicant states that the radiation of his crops, his seeds for replanting and his land will preclude him from marketing his product as organic and natural. He also states that in the natural foods community the exposure of his product and land to radiation from a telecommunications tower will be regarded as a contamination of his product undermining the integrity of his product and will preclude him from marketing his product as organic and natural. He maintains that his customers will not buy product subject to contamination from a telecommunications tower.

[6] The Applicant claims that he will be unable to overcome the stigmatization due to the exposure of his product and land to the radiation. He maintains that this will result in the same type of harm that cannot be quantified in monetary terms as identified in *RJR-MacDonald,* at paragraph 59. That is, he will suffer permanent market loss, irrevocable damage to his business reputation and, ultimately, he may be forced out of business.

[7] The onus is on the Applicant to prove on a balance of probabilities that irreparable harm will occur if the stay is not granted. Further, the alleged harm may not be hypothetical or speculative: *International Longshore and Warehouse Union, Canada v. Attorney General of Canada,* 2008 FCA 3, at paragraph 25.

[8] Turing first to the assertion of radiation damage to the Applicant's crops and land, as part of the approval process, Eastlink had to meet the standards established by Health Canada in *Safety Code 6: Guideline limits of Human Exposure to Radiofrequency Electromagnetic Fields in the Frequency Range from 3KHz to 300 GHz*. According to the calculations made in accordance with Safety Code 6, the radio frequency "exposure" measured from the tower to the Applicant's home is 782,518 times lower than the safe limit for humans established by the code. At the base of the tower, the exposure will be 60,000 times lower than the limit in *Safety Code 6*. As the Applicant has not adduced any evidence regarding radiation levels nor has he tendered any evidence to contradict the safety calculations, there is no basis upon which to find that there will be radiation damage to the crops and the land.

[9] As to the Applicant's assertion that he will not be able to market his product as "organic", in response to this concern, Eastlink contacted a Standards Specialist with the Canadian General Standards Board (CGSB). This Board is a Standards Development Organization within the National Standards System of Canada. The Board's role, through the use of a committee comprised of experts representing users, producers and general interest groups, is to manage the development of consensus standards. The committee is responsible for the technical details of the standard. The Standards Specialist stated that the chair of the CGSB Committee on Organic Agriculture confirmed that there was nothing in the standards in relation to "hertzian wave contamination".

[10] The Applicant takes the position that it is irrelevant whether a certification body would certify his product as "organic" notwithstanding the tower. As noted above, his assertion of

irreparable harm relates to the consequences flowing from the stigma that will attach to his product and his land due to the proximity to the tower.

[11] The Applicant did not submit any evidence from his customers or others in the natural foods community as to how they would regard the Applicant's product should the tower become operational. Instead, he maintains that he is in the best position to know the concerns of his customer base and the probable effect of the proximity of the tower on the integrity of his product and on his business reputation. While I do not doubt the sincerity of the Applicant's belief, his belief or opinion as to the perception of others is speculative in nature. In the absence of other evidence, the Applicant has failed to prove on a balance of probabilities that irreparable harm will occur if the stay is not granted.

[12] Accordingly, the motion will be dismissed with the matter of costs reserved for the application judge.

ORDER

THIS COURT ORDERS that: the motion is dismissed with costs reserved to the application judge.

"Dolores M. Hansen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1823-09
STYLE OF CAUSE:	LENNARD LEVINE v. THE MINISTER OF INDUSTRY and BRAGG COMMUNICATIONS INCORPORATED doing business under the business name, EASTLINK
PLACE OF HEARING:	Halifax, Nova Scotia
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REASONS FOR ORDER:	HANSEN J.
DATED:	December 21, 2009

APPEARANCES:

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