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TELECOMMUNICATIONS: TOWERS OF (FEDERAL) POWER

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I. INTRODUCTION

While some telecommunication towers, such as the CN Tower, can offer multiple uses and be heralded as a landmark, other telecommunication towers can be considered a neighbourhood blight. While many local governments in British Columbia are home to a telecommunication installation or cell-phone tower, residents, the Council or the Board may be unaccustomed to the limitations that local governments have in regulating the use and siting, building and geotechnical standards, and health and nuisance impact of such structures.

Telecommunication and radiocommunication are both areas of federal government jurisdiction that relate to cell phone towers. Parliament has granted the Minister of Industry, Industry Canada, and the Canadian Radio-Telecommunication and Television Commission (the "CRTC") the authority to regulate telephone companies, cell phone towers and other broadcasting towers. Canada's *Constitution* causes much of the activities and structures associated with cell phones to be subject exclusively to regulation by these federal entities. This paper will discuss the Constitutional principles that apply to cell phone towers, the general scope and exercise of federal regulation over cell phone towers, and how local governments may influence, and in some circumstances regulate, aspects of those telecommunications structures.

II. THE FEDERAL CONSTITUTIONAL POWER TO REGULATE TELE - AND RADIO-COMMUNICATIONS

The *Constitution Act, 1867* charts the general divide between Parliament's and the provincial legislature's powers. The provincial legislatures can delegate any of their powers to local governments and those delegable powers of a local nature include, pursuant to section 92 of the *Constitution Act*, *1867*:

> …
>
> 10. Local Works and Undertakings other than such as are of the following Classes:
>
> (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
>
> …
>
> 13. Property and Civil Rights in the Province.

> …
>
> 16. Generally all Matters of a merely local or private Nature in the Province.

Amongst the broad powers of provinces to regulate local works, matters and property, is an exclusion of a power to directly regulate those local works and undertakings that create inter-provincial and international connections. These matters fall under Parliament's jurisdiction.

Cell phone communication may have developed over 100 years after the passing of the *Constitution Act, 1867*, but it is a technology that creates inter- and extra-provincial connections and as such falls within federal jurisdiction. Canadian Courts have found that other post-1867 technologies, such as television, internet service providers airports and airplanes, are also within Parliament's jurisdiction either because of the inter-provincial connections they create or because their nature compels federal regulation for "the Peace, Order, and good Government of Canada" (*Constitution Act, 1867*, s. 91).

The most significant court decision for cell phones was made back in 1932 when the United Kingdom-based Judicial Committee of the Privy Council (at the time Canada's highest court) considered government regulation of simpler radio transmission. The Privy Council confirmed that Parliament had jurisdiction to:

> regulate and control radio communication, including the transmission and reception of signs, signals, pictures and sounds of all kinds by means of Hertzian waves, and including the right to determine the character, use and location of apparatus employed.
>
> (Re Regulation and Control of Radio Communication in Canada, [1932] A.C. 304 (P.C.)(Radiocommunication Reference))

In the *Radio Communication Reference*, the Privy Council distinguished radio broadcasting from the telephone, but found both to be undertakings that connect provinces. Cell phones create connections using a combination of telephone and radio technologies.

Cell phones, like public broadcast technologies such as television and AM/FM radio, rely on transmission by radio (Hertzian) waves. The key technological difference between cell phones and AM/FM radio being that cell phones use a much higher frequency (~830MHz or ~1750MHz) and operate as a two-way radio connected to telephone network. The radio "broadcasting" involved in a cell phone is less apparent, because it is a simple two-way sound transmission between the cell phone and the nearest hub station (cell phone tower). This transmission is technically as much a broadcast as the CBC's "Cross Country Check Up", except that the cell phone user reasonably expects that only the person listening is another telephone user connected with the antenna. Bystanders to the caller may disagree.

The technical evolution of radio-communication has coincided with the evolving judicial interpretation of the dividing line between federal and provincial regulatory powers. This line has placed radio apparatus on the federal side of jurisdiction but nuisance and land use regulation on the provincial side. Our courts' attempts to allocate jurisdiction between the two is not always clear. At present, the courts apply two Constitutional doctrines to address legal uncertainties with the division of constitutional powers: *paramountcy* and *interjurisdictional immunity*. Despite these doctrines have been developed by over a century of Constitutional interpretation, we still have four significant Supreme Court of Canada cases from the last three years alone that show that the Court continues to wrestle with and change the rules of applying our *Constitution*. Three of these cases related to land use. A brief discussion of those cases is necessary to demonstrate the scope of the federal powers over cell phone tower regulation and the more limited municipal control over areas of general local concern.

A. Interjurisdictional Immunity

The doctrine of interjurisdictional immunity lends itself to a comparison to "enclaves" of federal -only regulation, although the Courts do not apply the doctrine quite so broadly. Interjurisdictional immunity applies to those aspects of a field of federal jurisdiction that are the basic, minimum and unassailable content. This "core" of the field of jurisdiction is what is "immune" to provincial regulation. (Technically, there should also be core areas of Provincial regulation but the doctrine is almost never applied this way.) Therefore, determining the core of the federal interest in telecommunications and radio communication will establish the activities that local governments cannot regulate.

The case of *Quebec (A.G.) v. Canadian Owners and Pilots Association*, 2010 SCC 39 (*COPA*) provides a very recent example of activities that benefit from interjurisdictional immunity to provincial regulation. In *COPA*, the Court considered government jurisdiction over aerodromes, private landing strips that do not serve scheduled airlines. Although, Parliament has jurisdiction over aeronautics and aerial navigation, Quebec enacted land use regulations that excluded aerodromes from protected agricultural areas. The Supreme Court of Canada found that regardless of whether the provincial legislation was being applied to large airports or small private aerodromes, the *location* of airports and aerodromes is at the core of the aeronautics power. Provincial and municipal legislation could not "impair an essential part of the legislative competence" that is the federally regulated undertaking (*COPA*, at para. 38) despite the Provincial interest in both agriculture and land use regulation. As will be discussed below, strong parallels in the case law are often drawn between the placement of airports and the placement of cell phone antenna.

Not all decisions associated with aeronautics fall within the "core" of federal jurisdiction. Airlines cannot decide to not pay provincial liquor tax on alcohol served on flights merely because sales occur on an airplane (*Air Canada v. Ontario (Liquor Control Board*), [1997] 2 S.C.R. 581). But taking off and landing are both considered core and essential to the aeronautics

authority and therefore immune from Provincial regulation, even when the Province has a legitimate or even core interest in regulating land use.

B. Paramountcy

The *Lacombe* and *COPA* decisions came only a few years after the Supreme Court of Canada held that local governments had jurisdiction to regulate lands that were related to, but not "closely integrated" with shipping and navigation, or were controlled by a federal agent but not owned by Canada. In *British Columbia (A.G.) v. Lafarge Canada Inc.*, 2007 SCC 23 (*Lafarge*), the Court considered land use regulation over an offloading/concrete batching facility. This facility was part of the Port of Vancouver and thus linked to the federal interest in shipping and navigation, but the concrete batching plant was on land not owned directly by Canada and was placed near the offloading facilities out of convenience rather than necessity.

The Court found that if the concrete batching plant facility was not subject to provincial regulation it could create a legal vacuum in which non-federal aspects of a federally regulated enterprise go unregulated because of an absence of federal regulation and immunity from provincial regulation. Instead, the Supreme Court of Canada chose to apply the paramountcy doctrine in *Lafarge.* This doctrine is applied in one of two ways. If the federal legislation requires something which the Provincial legislation prohibits, or vice-versa, the federal legislation applies and the provincial legislation does not. However, if one can comply with both the federal regulations and the provincial regulations, they will both apply unless the provincial regulation "frustrates the federal purpose" (*Lafarge* at para. 82). Our British Columbia Court of Appeal most recently applied the *Lafarge* decision to uphold the applicability of land use bylaws to navigable waters in *Salt Spring Island Local Trust Committee v. B & B Ganges Marina.*

In the *Lafarge* decision, together with *Canadian Western Bank v. Alberta*, 2007 SCC 22 concerning federally regulated banks subject to provincial insurance regulations, the Supreme Court had strongly suggested that, in future, paramountcy was to be the preferred tool for determining the application of provincial and local laws. Specifically, the Supreme Court of Canada suggested that interjurisdictional immunity was of limited and somewhat historical application. The *COPA* and *Lacombe* decisions have since shown that the Court will still rely solely on interjurisdictional immunity for determining certain matters, even where the Court finds that a paramountcy analysis would have the opposite result (*COPA)*.

C. Which doctrine applies to Cell Phone Towers?

In light of the *COPA* and *Lacombe* decisions regarding aeronautics and the parallels the Courts specifically make to the core of telecommunications, it is highly probable that the regulation of cell phone towers by Parliament benefits from a protected federal core of interjurisdictional immunity. Recent decisions in which the Supreme Court of Canada applied the interjurisdictional immunity to the regulation of activities of telecommunications companies ("telecoms") include *Bell Canada. v. Quebec*, [1988] 1 S.C.R. 749 and *Northern Telecom Canada*

Ltd. v. CWC, [1983] 1 S.C.R. 733. Interjurisdictional immunity was also applied in *Telus Communications Co. v. Toronto (City)* (2007), 84 O.R. (3d) 656 (*Telus*), an Ontario Superior Court of Justice decision that held that Toronto's zoning bylaw, which regulated the height and placement of all structures within certain zones, did not apply to regulate antenna sites operated by a telecom.

The reasoning in the *Telus* decision relied entirely on the conclusion that the parameters such as height and location of the antenna sites were vital to a telecommunication undertaking. While this is no doubt true, some might think the proliferation of capacity and overlapping towers may be less essential. Nevertheless, it appears that our courts have now signalled that regulations that impair the ability of a telecom to determine its optimal antenna location and height will not be applicable.

The increasing use by telecoms on radiocommunication causes telecoms to be subject to federal jurisdiction over both telecommunication and radiocommunication. A telecom system is increasingly comparable to the radio broadcasting system discussed by the Privy Council in the *Radio Communication Reference*:

> Broadcasting as a system cannot exist without both a transmitter and a receiver. The receiver is indeed useless without a transmitter and can be reduced to a nonentity if the transmitter closes. The system cannot be divided into two parts, each independent of the other.

The essential nature of a sending and a receiving transmitter or two-way transmitters like a cell phone and hub station, suggests that the size of the transmitter or whether or not it relates to a large telecom undertaking, does not diminish its characterization as a federal "thing".

In *COPA* and *Lacombe,* the Supreme Court of Canada focused on the fact that for aeronautics to occur, planes need somewhere to take off and to land and so the landing strip, whatever its nature, lies at the core of that field of federal regulation. The manner in which tele- and radiocommunication is regulated by federal entities similarly suggests that all antenna that transmit radio waves, from giant tv masts to cordless telephones are within a wide "core" of federal jurisdiction.

III. HOW PARLIAMENT REGULATES TELE- AND RADIOCOMMUNICATION

Telecommunications and radio-communications in Canada are regulated by a number of federal entities. The majority of regulation is done by Industry Canada and the CRTC, with Health Canada and Transport Canada playing a limited role. Industry Canada is generally responsible for the technical aspect of the tele- and radio-communications in Canada. The CRTC deals with the ownership, content and accessibility of such communications. Health Canada has a more limited focus on health concerns associate with radio waves, and Transport Canada with antenna visibility for aircraft. There is overlap even between these federal

entities, however local governments will generally be most interested in the role that Industry Canada plays in regulating cell phone towers.

It is important to remember that while cell phones are used for telecommunication, the cell phone tower is an antenna used in radio-communication. These antenna are the connective medium that carry telephone calls over some of the distance traversed by the call and in place of copper or fibre-optic telephone wires. Cell phone hub stations, the antenna that are spaced apart to create a "cellular" network of coverage, emit less power and have less transmission range than antenna used for television or AM/FM radio broadcasting, but are nonetheless regulated by Industry Canada and the CRTC in their respective roles.

A. Role of Industry Canada

Industry Canada is the administrative department of the Minister of Industry and at law it essentially does everything that the Minister is authorized to do under the *Telecommunications Act*, S.C. 1993, c. 38 and the *Radiocommunication Act*, S.C. 1989, c. 17. These acts authorize the Minister to regulate numerous matters in relation to telecommunication and radiocommunication.

Cell phone towers are defined as a "radio apparatus" under the *Radiocommunication Act* as they are "a device or combination of devices intended for, or capable of being used for, radiocommunication". "Radiocommunication" includes wireless cellphone telephone communication since the *Radiocommunication Act* includes the definition:

> "radiocommunication" or "radio" means any transmission, emission or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than 3 000 GHz propagated in space without artificial guide;

A radio apparatus does not just include a large cell phone tower, but also the cell phone itself and smaller hub stations that might not be attached to an elevated tower.

Section 4 of the *Radiocommunication Act* prohibits all operation of a broadcasting apparatus except that which is operated in accordance with a "radio authorization".

> 4. (1) No person shall, except under and in accordance with a radio authorization, install, operate or possess radio apparatus, other than
>
> > (a) radio apparatus exempted by or under regulations made under paragraph 6(1)(m);
> >
> > or

> (b) radio apparatus that is capable only of the reception of broadcasting and that is not a distribution undertaking.

The exemptions are quite broad and cover most personal uses of a radio technology, including radio-controlled toys, wireless internet routers and cordless telephones. The fact that all radiocommunication technology is exempted or specifically authorized also shows that Parliament is actively exercising its jurisdiction over everything to do with radiocommunication.

Larger radio apparatus, including cell phone towers require ministerial authorizations that come in the form of licences and certificates. The scope of these authorizations is set out in Section 5(1) of the *Radiocommunication Act*:

> 5. (1) 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,
>
> (a) issue
>
> (i) radio licences in respect of radio apparatus,
>
> (i.1) spectrum licences in respect of the utilization of specified radio frequencies within a defined geographic area,
>
> (ii) broadcasting certificates in respect of radio apparatus that form part of a broadcasting undertaking,
>
> (iii) radio operator certificates,
>
> (iv) technical acceptance certificates in respect of radio apparatus, interference-causing equipment and radio-sensitive equipment, and
>
> (v) any other authorization relating to radiocommunication that the Minister considers appropriate,
>
> and may fix the terms and conditions of any such licence, certificate or authorization including, in the case of a radio licence

and a spectrum licence, terms and conditions as to the services that may be provided by the holder thereof;

> (b) amend the terms and conditions of any licence, certificate or authorization issued under paragraph (a);
>
> (c) make available to the public any information set out in radio licences or broadcasting certificates;
>
> **(d) establish technical requirements and technical standards in relation to**
>
> > **(i) radio apparatus,**
> >
> > **(ii) interference-causing equipment, and**
> >
> > **(iii) radio-sensitive equipment,**

or any class thereof;

> (e) plan the allocation and use of the spectrum;
>
> **(f) 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;**
>
> (g) test radio apparatus for compliance with technical standards established under this Act;
>
> (h) require holders of, and applicants for, radio authorizations to disclose to the Minister such information as the Minister considers appropriate respecting the present and proposed use of the radio apparatus in question and the cost of installing or maintaining it;
>
> (i) require holders of radio authorizations to inform the Minister of any material changes in information disclosed pursuant to paragraph (h);
>
> (j) appoint inspectors for the purposes of this Act;

> (k) take such action as may be necessary to secure, by international regulation or otherwise, the rights of Her Majesty in right of Canada in telecommunication matters, and consult the Canadian Radio-television and Telecommunications Commission with respect to any matter that the Minister deems appropriate;
>
> **(l) make determinations as to the existence of harmful interference and issue orders to persons in possession or control of radio apparatus, interference-causing equipment or radio-sensitive equipment that the Minister determines to be responsible for the harmful interference to cease or modify operation of the apparatus or equipment until such time as it can be operated without causing or being affected by harmful interference;**
>
> (m) undertake, sponsor, promote or assist in research relating to radiocommunication, including the technical aspects of broadcasting; and
>
> (n) do any other thing necessary for the effective administration of this Act.

The list is quite expansive, but what is important for local governments to note is that the Minister, and consequently Industry Canada, has the authority to determine the siting of radio apparatus and approve the erection of antenna (s. 5(1)(f)). The Minister may also address potential harmful interference (s. 5(1)(l)). These are often concerns that local governments and their constituents direct at cell phone tower approvals.

Industry Canada issues "Radio Licences" for cell phone towers as their radiocommunication purpose is not defined as "broadcasting". For antenna that transmit television or AM/FM radio signals, Industry Canada issues "Broadcasting Licences". A single antenna can have more than one licence. Industry Canada licences are usually of limited duration (typically five years) and can be amended or revoked. It is therefore possible that Industry Canada will decide to shut down a previously permitted cell phone tower.

In 2009, Industry Canada has made it an objective to increase antenna site sharing amongst competitors. It would appear that this objective will be achieved by making sharing a condition of licensing, including recourse to arbitration if appropriate rent cannot be agreed upon. Site sharing would have incidental effects on land use as it would reduce the number towers built, but also increase the intensity of the use of the towers that are built.

Industry Canada also exercises ministerial authority under the *Telecommunications Act.* The licensing and standards in this field affect the wire and fibre-optic communicative apparatus which also carry communicative signals and may also form part of a cell phone tower.

B. Role of the CRTC

The CRTC deals with more the what and the who of tele- and radiocommunication. Which companies may operate a cell phone tower will depend on whether a company has received the necessary permissions under the *Telecommunications Act*. The CRTC may also impose technical requirements on telecoms, but for the most part whether a cell phone tower is permitted will depend on Industry Canada. The CRTC's regulations are more often applied to broadcasters as the CRTC issues Broadcasting Licences for certain frequencies, and a set signal strength, the purpose of which is to ensure broadcast transmissions are widely available but not interfering with each other.

C. Role of Health Canada

Health Canada is a federal department that has a limited, but nonetheless significant role in Cell Phone Tower placement and use. Within Canada's federal government, Health Canada has been tasked with assessing the safe levels of electro-magnetic field exposure that result from radiocommunication. The standards that Health Canada develops are not applied as statutory regulations but as conditions with which holders of radiocommunication licences and permits must comply.

D. Role of Transport Canada

Under the *Canadian Aviation Regulations 2010-1* adopted pursuant to the *Aeronautics Act*, Transport Canada imposes requirements for the marking and/or lighting of "likely hazards to aviation safety". Taller radiocommunication towers are usually built in areas where tall buildings cannot be used as supports, so markings and lighting are likely to be required. Unfortunately the increased visibility of the antenna may add to the local unpopularity of the antenna's unsightliness.

IV. FEDERAL CONSULTATION PROCESS

So far the discussion has focused on leading constitutional cases that establish federal jurisdiction over core aspects of telecommunications. But the construction of telecommunications towers and their signals also can have a dramatic impact on local interests. Starting in this part of the paper we will discuss the ways in which local governments can participate in decision-making around the location and specifications of towers in the context of the constitutional division of powers in this country.

A. Industry Canada Mandated Consultation

Industry Canada recognizes, to an extent, that there are local concerns regarding the placement of radiocommunication antennas. Prior to the granting of licenses and permits, Industry Canada requires proponents and its own department to comply with the procedures and standards set out in federal policy documents. For the placement of a cell phone towers, the following circulars are relevant:

- Client Procedures Circular CPC-2-0-03 - Radiocommunication and Broadcasting Antenna Systems
- Client Procedures Circular CPC-2-0-02 (Antenna Structure Clearance);
- Internal Procedures Circular IPC-2-0-01 (Antenna Structure Clearance);
- Client Procedures Circular CPC-2-0-03 (Environmental Process Radiofrequency Fields and land-Use Consultation);
- Internal Procedures Circular IPC-2-0-03 (Environmental Process, Radiofrequency Fields and land-Use Consultation);

The most important circular to local governments is CPC-2-0-03 (the "Siting Circular"), because it requires cell phone tower proponents to engage in local authority land use consultation as part of many Industry Canada application processes. These processes include applications to install a new cell phone tower, or increase the height of an existing tower.

The procedures set in out the Siting Circular provide a local government and its residents their best opportunity to influence the placement of cell phone towers. The Siting Circular was most recently revised in June 2007, likely in response to criticism of Industry Canada's permit issuing process for not giving enough consideration to land use concerns. The Siting Circular requires telecoms to engage in land use consultation and one of two types of public consultations, either the default public consultation process set out in the Siting Circular or a consultation process developed by the local land-use authority.

There are a number of scenarios in which Industry Canada does not require any consultation process be engaged, including additions to an existing tower that do not raise its overall height above 25% or any new tower with a height of less than 15 metres (about 50 feet). The Siting Circular does recommend that proponents who benefit from exclusions consider engaging in a consultation process in any event.

Although the consultation process begins and ends with consultation with the land use authority, which usually includes a local government, this paper will first discuss the two types of public consultation, as they may have a significant influence on the process.

B. Public Consultation

The Default Public Consultation Process

The Default process contains a number of steps that are required to be completed within 120 days of its commencement. The steps include public notification, the proponent's response to public comments, public reply to that response, and the consultation conclusion. This paper will summarize key aspects of each of these steps.

Public Notification: The default process requires that everyone located within a radius of three times the tower's height be notified of the proposal and advised of a 30 day period in which to ask questions or voice concerns in writing. A local government may submit such written correspondence.

Proponent Response: The telecom must acknowledge receipt of correspondence from the public within 14 days, and provide answers and explanations to the correspondence within 60 days and provide written notice of a 21-day period (starting on the date of the notice, not the date of receipt) in which to reply.

Public Reply: Anyone, including a local government, who has received a response can file a response. These responses are the only record of public comment that the telecom must provide to Industry Canada as part of the application. The proponent is likely only to receive replies from those who remain unhappy about the proponent's response to their initial questions and concerns and these replies are an opportunity to explain to Industry Canada the grounds for that person's continued objection.

Local Government Specified Consultation Procedure

In the Siting Circular, Industry Canada encourages the local governments to establish "reasonable, relevant and predictable consultation processes specific to antenna systems" in addition to a general encouragement that the proponent engage in discussion of reasonable alternatives or mitigation measures in response to concerns held by the local government. The guidelines in the Siting Circular suggest that the process must conclude within 120 days and have steps similar to the default public consultation. A local government may decide to just expand the area of public notification, or may seek to impose a dramatically different consultation procedure. If crafting its own procedure, the local government should be mindful of Industry Canada's goal of achieving local government concurrence for proposals. There is a risk that Industry Canada will conclude that an inflexible or onerous procedure is unreasonable or unresponsive such that it will excuse a proponent's non-compliance. The goal of concurrence is discussed in greater detail below.

The Land Use Authority Consultation

In addition to the public consultation process, the proponent is required to consult with the local land-use authority for the following purposes:

- discussing site options;
- ensuring that local process related to antenna systems are respected;
- addressing reasonable and relevant concerns of the land use authority and the community they represent; and
- obtaining land-use authority concurrence in writing;

Since the siting of antenna towers is a matter of exclusive jurisdiction, the discussion of "site options" is best described as a discussion of where the local government would like the tower to be rather than where the local government requires the tower to be. Reference to the prevailing zoning at potential sites may be used as a guide but it need not be the only consideration.

Similarly, at law the "local process related to antenna systems" can only refer to local government bylaw requirements that lawfully affect antenna systems or policies related to the local government's response to antenna proposals. Thus, even bylaws that may ultimately be found to be inapplicable if enforced directly, may still be recognized by Industry Canada as valid requirements that Industry Canada will respect.

Industry Canada's goal in requiring the consultation procedures set out in the Siting Circular is to give the proponent an opportunity to address the "reasonable and relevant concerns" of the local government and to obtain that local government's "concurrence". The Siting Circular may have chosen the word "concurrence" to avoid the more decisive connotation of the word "approval", but the essential goal of the local authority consultation process is to determine whether the local government approves of the proponent's application to Industry Canada. The Siting Circular suggests that such concurrence could be provided by:

> A letter or report acknowledging that the relevant municipal process or other requirements have been satisfied or other valid indication such as the minutes of a town council meeting indicating [land use authority] approval. Compliance with informal city staff procedures, or grants of approval strictly related to zoning, construction, etc. will not normally be sufficient (CPC-2-0-03 at page 7).

The discouragement of mere construction or zoning approvals is indicative of Industry Canada wanting to know the local government's opinion on whether its concerns have been addressed

rather than a bare statement of approval. Similarly, where the local government disagrees with the proposal it should provide written reasons to Industry Canada, for example, the reasons why a local government has concluded that a proposed antenna does not address hazardous conditions associated with the alteration of land in a development permit area designated under *Local Government Act*, s. 919.1(1)(b). This would likely receive more meaningful consideration than a statement that no development permit would be issued for such a structure or a blanket zoning restriction on cell phone towers.

In situations where the local government continues to disagree with the proposal, it should consider delivering a written request to Industry Canada to intervene regarding a reasonable or relevant concern. It would appear that Industry Canada is prepared to allow the parties to engage in a form of dispute resolution process to address the concern. Final resolution will either be achieved by the proponent and the local government finding a solution to the local government's concern or Industry Canada making a decision on the issue. A decision in favour of the local government may very well be determinative of the entire process. Telecoms tend to consider Industry Canada as their advocate and resource, but, in fact, local governments have the same ability to petition for assistance and resolution of disputes from the Minister in their dealings with telecoms.

Conclusion of the Consultation Procedure

The conclusion of Industry Canada's consultation procedure may be arrived at by many different routes, but in the end, Industry Canada will consider a proponent's application for a radio licence or other permit with regard to the public replies to the proposal, if any, and the concurrences of land use authorities, if any. As Industry Canada is exercising Parliament's exclusive jurisdiction over the placement of cell phone towers, it is open to Industry Canada to permit the tower despite the objections of members of the public or a local government. A local government's concurrence or disagreement with a proposal is an influencing but not determinative factor regarding the placement or the height of the cell phone tower. While local governments may prefer that they be capable of exercising regulatory authority of cell phone tower placement, it should be acknowledged that even the current level of consultation is an improvement over previous federal policies.

V. LOCAL GOVERNMENT CONCERNS AND STRATEGIES

Despite the *Constitution* and our Courts, designating telecommunications and their towers to the federal Crown, the towers and antennas do raise many particularly local interests that would ordinarily be in local government jurisdiction, including land use, building standards, health preservation and nuisance avoidance.

A. Land Use

A cell phone tower may raise a number of public concerns in relation to land use, including aesthetics and property values and it may be difficult for some members of the public to accept

the tower's placement anywhere. A willingness to mitigate aesthetic concerns on the part of the telecom may be overwhelmed by visibility requirements imposed by *Transport Canada*. In any event, a local government should be able to voice the reasons why a development permit or a zoning bylaw would be interpreted as prohibiting or modifying the placement of a cell phone tower to both the telecom and Industry Canada.

In addition to zoning bylaws, OCP's may designate development permit areas and guidelines that may have some application. Depending on the type of development permit requirement, it may even be possible that these requirements would be found to be constitutionally binding. For example, it is more likely that a geotechnical development permit requirement would be found to be applicable than a blanket height restriction, as local geotechnical hazards are arguably core to Provincial and local concerns, whereas height concerns are less essential and already addressed through the federal process. Environmentally sensitive development permit areas may raise similar concerns, however there is a federal process that may take precedence where it is applicable.

In any event, where the tower triggers a consultation process both environmental and geotechnical concerns are more likely to be considered seriously by Industry Canada. The more difficult issue will be attempting to enforce these standards for towers under 15m or that are otherwise exempt from the consultation process.

B. Building and Geotechnical Standards

As with development permits discussed above, a local government may insist on compliance with its building bylaw and the issuance of a permit prior to construction of any structure. Some telecoms operating in British Columbia do in fact apply and receive building permits, although others immediately assert that the building bylaw does not apply.

In our experience Industry Canada will accept, as part of the consultation process, that a local government may require an application for a building permit where its building bylaw does not expressly exempt utility towers (we note that many do). This would likely be an acceptable practice pursuant to the Supreme Court's current vision of cooperative federalism, where the Court has indicated it will encourage (rather than discourage) this type of multi-jurisdictional cooperation. If the building permit relates solely to ensuring that sound structural (or geotechnical where applicable) engineering practices and inspections are taking place, we expect based on past experience that Industry Canada would incorporate this requirement in its process.

Ultimately, however, Industry Canada may choose to issue its own permits and licenses without a building permit or other bylaw compliance, and the issuance of a federal licenses or permits would almost undoubtedly take precedence over a building permit both as a result of the doctrine of paramountcy and interjurisdictional immunity. Withholding of a building permit for non-compliance with other bylaw requirements, such as siting or zoning, is also unlikely to be accepted by Industry Canada.

The greater test of building permit requirements will arise in those cases where there is no consultation process (i.e. where the tower is less than 15 metres high or is an accepted addition to an existing tower). In those cases, the federal government has apparently rejected the need for local consultation, making the constitutional case for cooperative federalism and the application of local bylaws much more difficult. Furthermore, in *Mississauga (City) v. GTTA* (2000), 50 O.R. (3d) 641 (C.A.) the Ontario Court of Appeal considered the application of the Provincial *Building Code* to the construction of an airport (another federal undertaking). In that case, the City's attempt to require permits, inspections, and fees and charges pursuant to its building bylaw was rejected on the basis of the federal jurisdiction over the airport, which was found to extend to its design and construction such that the City's bylaw and the Provincial *Building Code* did not apply. We note, however, that in that case there was a finding that there was a federal process and standard that was applicable to airport construction, where no such Code applies to cell phone towers.

Ultimately, where there are significant structural or geotechnical issues with a structure or a site, but no formal consultation process, we consider it is likely that either Industry Canada will find a way to respond to these concerns, or that the local government could get the courts to consider the application of some standards that would protect the public welfare, provided they do not interfere with technical requirements for the site.

C. Health and Nuisance Concerns

In addition to aesthetic and structural concerns, a local government may also be concerned with the impact a cell phone tower has on individual health and enjoyment of people's property. Whether, and to what degree, the use of cell phones and other radio technology poses a health risk is still subject to debate, however from a legal perspective a cell phone tower need only be operated within the parameters set by the authorizing Radio Licence. Such parameters include, invariably, emitting electromagnetic fields within the acceptable ranges set out in Health Canada's Safety Code 6 (Limits of human exposure to Radiofrequency Electromagnetic Fields in the Frequency Range from 3kHz – 300 Ghz). Safety Code 6 also applies to other technologies that use radio waves, such as television broadcasts and Wi-Fi internet connections.

In theory, electromagnetic interference by cell phone towers and other radio apparatus with other people's electronic equipment should not occur so long as Industry Canada and the CRTC have been careful with the spectrum allocations and emission power, and geographic placement of licensed antenna. If this does not appear to be the case, then the first question should be whether there is non-compliance with the federal conditions of licensing. If so, then a first resort ought to be a formal complaint to the CRTC or Industry Canada to address the issue.

In addition to federal regulations, nuisances caused by cell towers that are not specifically authorized by federal statute may also be prohibited at common law and could be subject to an injunction.

The B.C. Court of Appeal considered in *Sutherland v. Canada (A.G.)*, 2002 BCCA 416 (*Sutherland*) whether a clear nuisance to residents caused by the placement of an airport runway in Richmond was permitted as a result of federal statutory authority. If the federal regulation authorized the runway to be placed where it was, the upset neighbours could not successfully sue in nuisance. The Court held in *Sutherland* that

> The "well settled" rule accepted prior to *Tock* was re-established in *Ryan*. These authorities and comments make clear what the law requires when the defence of statutory authority is pleaded. The statute must authorize the work, conduct or activity complained of, either expressly or by necessary implication. The test focuses on what work, conduct or activity is authorized by statute, rather than on the person or body upon whom the authority is conferred.
>
> To understand what work, conduct or activity has been authorized in this case, one must have regard not only for the relevant statutes, but also for the Orders-in-Council and the Regulations (at paras. 66-67).

In that case the federal ministerial Order which required the precise specifications and location of the runway was found to be sufficient to immunize the operators of the airport from the nuisance claim. However, where the statutory permit or authorization allows a range of acceptable options, a claim in nuisance will still be successful if the nuisance could have been avoided by taking one of those other options. So, for example, where a federal license allows electro-magnetic emissions within a range, and the upper range will cause a nuisance and the lower range will not, a telecom should not be able to avoid liability in nuisance if it uses the upper range, and not the lower.

VI. CONCLUSION

The prevailing application of the *Constitution Act, 1867* by Canadian courts grants our federal Parliament the exclusive jurisdiction to regulate matters that lie at the core of tele- and radiocommunication. Such matters appear to include the site, height, and technical standards of cell phone towers and other radiocommunication apparatus under current case law, leaving very little room for the independent application of local regulation.

Nevertheless, some aspects of towers and their operations may be susceptible to a degree of local control. Issues not addressed by the federal regulatory process, such as geotechnical siting issues, and possibly structural engineering requirements may be of sufficiently local

concern to establish the Provincial Constitutional interest in the application of these safeguards. In addition, Industry Canada has adopted measures under which land use authorities and the public are consulted for towers of a certain size. Local governments may wish to enact bylaws that do regulate cell phone towers knowing that they may not be directly enforceable but may have some influence over the federal consultation process. At the very least, local governments should strongly consider establishing a consultation policy for cell phone towers that provides a broader process for public consultation, and incorporates processes around siting variances and development permits processes into that consultation process.

While the CRTC and Industry Canada will ultimately make most of the decisions and issue the key approvals for cell phone towers and their operations, these are steps local governments can take to influence these operations within their communities.

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