



**STAFF REPORT
ACTION REQUIRED
Confidential Attachment**

**Appeal of Court Decision Re: Telus Communications
Company Challenge to Site Plan By-law**

Date:	April 16, 2007
To:	City Council
From:	City Solicitor
Wards:	All
Reason for Confidential Information:	This report contains advice or communications that are subject to solicitor-client privilege.
Reference Number:	

SUMMARY

This is a report on the Court decision dated March 2, 2007 relating to Telus Communications Company's ("Telus") challenge to the City's site plan by-laws. Telus sought a court declaration preventing the City from applying site plan to new telecommunication facilities. Telus carries on a federal undertaking that is regulated by Industry Canada and relied upon the legal principle of interjurisdictional immunity to support its court challenge.

RECOMMENDATIONS

The City Solicitor recommends that:

1. City Council adopt the confidential recommendations in Attachment 1.
2. Council's instructions to staff related to this matter be authorized for public release at the conclusion of the Council meeting.

DECISION HISTORY

The City of Toronto does not have a harmonized site plan by-law in place and accordingly the site plans by-laws for the former municipalities of Metropolitan Toronto still apply. With the exception of the East York site plan by-law, the various site plan by-laws in place across the City do not expressly refer to telecommunication facilities, radio communication antennas and towers. City Council by By-law No. 340-2005 (the “East York By-law”) removed the exemption from site plan control that had expressly existed in East York for the erection or installation of radio communication antennas and towers. This change amongst other things appears to have prompted Telus to commence its court application challenging the East York by-law on the grounds that it purports to regulate Telus, which operates an exclusive federal undertaking. In addition, on the court application Telus sought a declaration that all of the site plan control by-laws of the former municipalities of Metropolitan Toronto (“Site Plan By-laws”) are of no force and effect with respect to Telus.

ISSUE BACKGROUND

Telus operates a wireless telecommunications network providing cell phone and other services to customers. In 2006 Telus commenced a court application challenging the City of Toronto’s ability to apply its site plan approval process to new telecommunication facilities. Telus constructs these facilities, which usually include antennas, antenna support structures and equipment shelters, on land owned by other persons and often on existing buildings in the City of Toronto. Telus has approximately 285 telecommunication sites in Toronto currently.

Affidavits were filed by both the City and Telus and cross-examinations were held on the Affidavit material. The court application was heard by Justice Lederman on January 23, 2007. He released his decision on March 2, 2007 finding in favour of Telus. The main issue on the application was whether the City’s site plan by-laws, passed pursuant to valid provincial legislation, can apply to telecommunication facilities which are regulated by Industry Canada. Telus relied upon the legal principle of interjurisdictional immunity to support its position.

The Court commented that it was the City’s position that its site plan approval process so minimally affects Telus that new telecommunication facilities are properly subject to site plan review. Telus’ position was that the site plan by-laws are rendered inoperative to the extent that they affect the siting, physical location, construction and operation of Telus’ federal undertaking. There was no issue between the parties that the area of telecommunications and radio communication is within federal jurisdiction. Industry Canada is the body that regulates this industry through a licensing regime. There was also no issue, that a site plan regime is a valid provincial (and municipal) matter falling within the Province’s constitutional jurisdiction over property and civil rights.

The Court found that Telus did not need to show that there had been any actual impairment of its business or operations but instead simply that the site plan by-laws presented the potential for impairment. The Court accepted Telus' evidence that the height, number and location of radio antennas all affect Telus' ability to maintain a functioning coverage network.

The Court went on to comment that although the City claims it does not set out to control the functionality of wireless facilities, and submits that it has not to date seriously interfered with Telus' ability to maintain its network, the Court may consider not only the actual impact of the laws as enforced, but also the potential impact of the laws as written. The Court concluded that given that site plan control covers essentially the entire City, the potential exists for the City to interfere with, or delay or deny approval for, the placement of antennas city-wide. The Court also commented that to the extent that site plan control enables the City to control the placement or siting of wireless towers, or to refuse or significantly delay permission to establish wireless towers, it allows the City to substantially impair Telus' essential activities. As a result, the Court granted the declarations that the East York By-law and the Site Plan By-laws have no effect on or do not apply to Telus' antenna sites.

Industry Canada's process

There was evidence on the court application regarding Industry Canada's current policies and guidelines on the need for consultation with the municipality or local land use authority. The governing policy documents state that the process instituted by Industry Canada "ensures that municipal/land use concerns are fully addressed". The City commented in its Affidavit materials as to its concerns with this process. There have been earlier reports to City Council regarding efforts by City staff to develop a protocol with respect to municipal consultation for the installation of telecommunication facilities that fits within Industry Canada's policy on municipal consultation. City Planning staff are working on a proposed protocol and intend to report to the September 5th, 2007 Planning and Growth Management Committee meeting. We point out that the Court seemed to accept Telus' arguments that the federal licensing regime requires Telus to seek meaningful consultation with the City before establishing new sites and therefore the site plan control system is not the City's only means of ensuring that it is consulted. In the interim, Planning staff have advised the various carriers that they should be submitting a cover letter and drawings for any proposed telecommunication installation to the Director, Community Planning in the appropriate District for review.

COMMENTS

Any appeal of this decision needed to be commenced by Notice of Appeal within 30 days of the decision. In order to preserve the City's rights, the City Solicitor's office served and filed a Notice of Appeal. The attached Confidential Report comments on whether the appeal should be pursued or not.

CONTACT

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SIGNATURE

Anna Kinastowski
City Solicitor

ATTACHMENTS

1. Confidential Attachment Re: Appeal of Court Decision Re: Telus Communications Company Challenge to Site Plan By-law
2. Decision of Justice Lederman dated March 2, 2007

ONTARIO
SUPERIOR COURT OF JUSTICE

TELUS COMMUNICATIONS COMPANY)	<i>Stephen J. D'Agostino & Al Burton,</i>
)	for the Applicant
)	
Applicant)	
)	
)	
- and -)	
)	
)	
CITY OF TORONTO)	<i>Diana Dimmer & Kirsten M. Franz,</i>
)	for the Respondent
Respondent)	
)	
)	
)	
)	
)	Heard: January 23, 2007

LEDERMAN J.

Nature of Application

[1] Telus Communications Company ("Telus") seeks an order quashing and declaring invalid City of Toronto (the "City") by-law number 340-2005 (the "East York By-law"). In the alternative, Telus seeks a declaration that the East York By-law is of no force and effect on the ground that it purports to regulate Telus, which operates an exclusive federal undertaking. In addition, Telus seeks a declaration that all of the site plan control by-laws of the former municipalities of Metropolitan Toronto ("Site Plan By-laws") are of no force and effect with respect to Telus.

Constitutional Framework

[2] There is no dispute that the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.) and related jurisprudence provide that the areas of telecommunications and radio communication are within federal jurisdiction. On the other hand, section 92(13) of the *Constitution Act, 1867*

grants to the provinces power over property and civil rights in the province. In Ontario, the province has delegated authority to the municipalities to restrict the use of land, pursuant to and subject to the provisions of the *Planning Act*, R.S.O. 1990, c. P.13. These land use restrictions are implemented through official plans, zoning by-laws, and development controls such as site plan control. In particular, section 41 of the *Planning Act* permits municipalities to regulate development by designating an area within a municipality that is subject to site plan control. (Now, s. 114 of the *City of Toronto Act, 2006*, S.O. 2006, c. 11, Schedule A governs the City's authority and powers over the site plan process.)

[3] The question raised on this application is whether the City's site plan by-laws, passed pursuant to valid provincial legislation, can apply to telecommunications facilities which are within federal jurisdiction.

[4] The City's position is that its site plan approval process so minimally affects Telus that new telecommunications facilities are properly subject to site plan review. Telus' position, on the other hand, is that affected federal undertakings are immune from otherwise valid land use planning by-laws, and that the by-laws in question are rendered inoperative to the extent that they affect the siting, physical location, construction and operation of Telus' federal undertaking.

[5] Telus challenges the by-laws on the grounds that they have the potential to result in the unconstitutional exercise of authority over Telus' business.

[6] An issue was raised during the hearing as to whether the court could legitimately rule on the constitutionality of the by-laws based on the *potential* for impairment of Telus' business, without any evidence of actual impairment.

[7] However, it is clear that the court may properly assess the constitutional arguments despite the lack of any actual impairment in this case. In *Bell Canada v. Québec (Commission de santé et de la sécurité du travail du Québec)*, [1988] 1 S.C.R. 749 at para. 318, the Supreme Court of Canada held as follows:

In deciding what constitutes impairment the Court cannot disregard potential impairment or effects, especially when, as here, far-reaching provincial statutes are at issue here designed to be accompanied by a large number of regulations, ordinances or remedial orders, or which can have major as well as minor effects on the undertaking, effects which cannot be foreseen at the time the Court must rule on whether the statute is applicable...

The By-laws in Question

[8] There are two by-law frameworks at issue: the East York By-law and the Site Plan By-laws. The East York By-law removed a pre-existing exemption from site plan control for the erection or installation of radio communication antennas and towers. As a consequence of the East York By-law, the site plan by-law governing the former Borough of East York specifically applies to telecommunication facilities. The Site Plan By-laws make up several by-laws that regulate site plan control for the former municipalities of Metropolitan Toronto.

[9] In essence, the by-laws provide that no person shall undertake development in a designated area unless the municipal council has reviewed and approved plans and drawings for the development. Included in this process is approval of plans showing the location of all buildings and structures to be erected and location of all facilities and works to be provided in conjunction therewith. The municipality may attach conditions to its approval relating to widenings of highways abutting the land, provision of vehicle and pedestrian access, driveways, parking, loading facilities, lighting, walls, fences, shrubs, landscaping, the protection of adjoining lands, garbage facilities, easements for public utilities and grading.

Interjurisdictional Immunity

[10] Telus submits that the principle of interjurisdictional immunity requires the court to read down the site plan by-laws such that they do not apply to the telecommunications industry.

[11] Professor Peter Hogg summarizes the early law of interjurisdictional immunity as follows at p. 15-30 of his text, *Constitutional Law of Canada*, 5th ed. (loose-leaf) (Toronto: Thomson Carswell, 2006):

Until 1966, the provincial laws that were held inapplicable to federally-regulated undertakings were laws that asserted a power to sterilize (paralyze or impair) the federally-authorized activity. This possibility, however unlikely in practice, was the basis of each decision. In the *Bell 1966* case (1966), the Supreme Court of Canada abandoned the language of sterilization, and held that the Bell Telephone Company (an interprovincial undertaking) was immune from a provincial minimum wage law on the lesser ground that such a law “affects a vital part of the management and operation of the undertaking.”

[12] The approach to interjurisdictional immunity was modified in *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927. The Supreme Court held that the more lenient “vital part” test applied only to laws that “purport to apply” to federal undertakings. By contrast, “where provincial legislation does not purport to apply to a federal undertaking, its incidental effect, even upon a vital part of the operation of the undertaking, will not normally render the provincial legislation *ultra vires*” (at paragraph. 22). This created a distinction between laws that apply to federal undertakings *directly* (and will be read down if they affect a vital part of the undertaking) and those that apply only *indirectly* (and will be read down only if they impair, paralyze or sterilize the undertaking).

[13] Telus submits that the test for interjurisdictional immunity is outlined as follows in *Mississauga (City) v. Greater Toronto Airports Authority* (2000), 50 O.R. (3d) 641 (C.A.) at para. 41:

The Supreme Court of Canada no longer uses the language of “impairs” or “interferes” or “paralyzes” or “sterilizes”. Instead, the Supreme Court has posited a much broader test of immunity or exclusivity. If a provincial law affects a vital or essential or integral part of a federally regulated enterprise, then the otherwise valid provincial law does not apply to that enterprise.

[14] This test, however, applies only where the provincial law applies *directly* to the federal undertaking, as per *Irwin Toy, supra*. At para. 44 of the *Mississauga (City)* case, the court noted that if “a provincial law only indirectly or incidentally affects a federal undertaking, it will apply unless it impairs, paralyzes or sterilizes the undertaking.”

[15] The analysis is therefore as follows:

- 1) Do the East York By-law and Site Plan By-laws “purport” to apply to the federal telecommunications undertaking? If so, do they affect a vital part of Telus’ undertaking?
- 2) If the East York By-law and Site Plan By-laws apply only indirectly, do they impair, paralyze or sterilize the undertaking?

1) **Do the by-laws apply directly or indirectly to telecommunications?**

[16] The by-laws designate the former boroughs of the Municipality of Toronto as “site plan areas” to which the site plan control sections of the *Planning Act* apply. Subsection 41(4) of the *Planning Act* reads as follows:

41.(4) No person shall undertake any development in an area designated under subsection (2) unless the council of the municipality or, where a referral has been made under subsection (12), the Municipal Board has approved one or both, as the council may determine, of the following:

1. Plans showing the location of all buildings and structures to be erected and showing the location of all facilities and works to be provided in conjunction therewith and of all facilities and works required under clause (7) (a). ...

[17] By-law No. 90-95, which was modified by the East York By-law, specifically refers to the erection and installation of radio communication and telecommunication towers. As it expressly refers to telecommunication towers, and applies to any “person” (including telecommunication providers), it could be said that it directly purports to regulate the telecommunications industry. As such, the “vital part” test would apply to this by-law.

[18] The other Site Plan By-laws do not refer specifically to telecommunication facilities. In any event, the City claims that the site plan process does not directly control the actions of telecommunication companies: rather, it is directed at the owners of the land on which Telus seeks to erect its towers (although it should be noted that s.41(4) of the *Planning Act* states that “no person (emphasis added) shall undertake any development” without plan approval).

[19] It appears that this distinction means that the Site Plan By-laws apply only indirectly to telecommunications. In *Irwin Toy, supra*, the impugned laws prohibited advertisers from directing advertising at children. While the laws had the effect of preventing broadcasters from

displaying such advertising, the laws were directed at (and enforceable against) the advertisers rather than the broadcasters. The court held that the effect on the broadcasters was indirect, and therefore that the “impairment” test, rather than the “vital aspect” test, applied.

[20] If the effect of the by-laws on telecommunications is indirect, the “impairment” test rather than the “vital aspect” test, would apply.

2) Do the by-laws “impair” the telecommunications undertaking?

[21] The test for “impairment” is defined in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161. At p. 184, the majority of the court held as follows:

The legislative powers of the Province are restricted so that 'the status and powers of a Dominion Company as such cannot be destroyed' (*John Deere Plow Co. v. Wharton, supra*) and legislation will be invalid if a Dominion Company is 'sterilized in all its functions and activities' or 'its status and essential capacities are impaired in a substantial degree' (*Great West Saddlery Co. v. The King*, [1921] 2 A.C. 91). Subject to that exception, a federal company empowered to carry on a particular business in a province is subject to the competent legislation of the province as to that business.

[22] Interjurisdictional immunity will therefore insulate Telus from site plan control only if the site plan regime has the potential to impair Telus' status and essential capacities in a substantial degree.

[23] There is a credible argument that the East York By-law and the Site Plan By-laws have the potential to impair the activities of telecommunication providers. Telus submits that the site plan control process has three potentially negative effects on its business:

- 1) it allows the City to place restrictions on the height and location of antennas and antenna structures, negatively affecting its wireless network;
- 2) the review process is undertaken by people who have no expertise in radio engineering and therefore have no way of knowing what kind of effect the City's requests can have on the performance of the Telus network; and
- 3) the site plan process creates unnecessarily lengthy delays that negatively affect Telus' business.

[24] Paras. 36 to 42 of the Affidavit of Robert Dragicevic provide evidence to the effect that the height, number and location of radio antennas all affect Telus' ability to maintain a functioning coverage network. To the extent that site plan control enables the City to require changes to these factors or to deny approval for the construction of towers, it appears from the Dragicevic Affidavit that site plan control allows the City to affect the quality and the extent of Telus' network coverage. Given that the essence of Telus' business is the provision of a wireless network, a regime enabling the City to refuse or significantly delay authorization for towers

needed to maintain that network could impair Telus' "essential capacities ... in a substantial degree."

[25] The City responds that it does not attempt to regulate the functionality of telecommunication facilities through site plan control. Rather, the City attempts to negotiate such things as the siting of a tower on a particular property, amongst other factors. The Dragicevic Affidavit provides evidence that the fine details of tower location can determine whether there is a gap in the Telus network, even to the degree that a tower placed close to the edge of a building will provide better coverage than a tower placed further inwards. Given this evidence, it appears that the regulation of "the siting of a tower on a particular property" could impair the activity that forms the core of Telus' business. While it is unlikely that the placement of a small number of towers would have a significant impact on Telus' business, the evidence suggests that City interference in the placement of a large number of towers could seriously impair Telus' ability to maintain effective network coverage in Toronto.

[26] Although the City states that it does not set out to control the functionality of wireless facilities, and submits that it has not to date seriously interfered with Telus' ability to maintain its network, the law is clear that, as stated earlier, the court may consider not only the *actual* impact of the laws as enforced, but also the potential impact of the laws as written. Given that site plan control covers essentially the entire city, the potential exists for the City to interfere with, or delay or deny approval for, the placement of antennas city-wide. At its extreme, this would enable the City to sterilize Telus' operation in Toronto.

[27] The City argues that the site plan system is its means of ensuring that telecommunications facilities are built with reasonable regard for the needs and concerns of the local community. The City acknowledges that site plan control has limited application to telecommunications facilities, and states that its purpose is to ensure that the City is aware of proposed new structures and to allow the City to request certain actions from applicants that will minimize the impact that such structures will have on the surrounding community. At para. 38 of the affidavit of Tom Keefe, Director of Community Planning for the North York District, the affiant states that the City's approach to site planning has been reasonable, and offers the example of a case in which the City used the site plan control process to request that Telus provide a fence and some shrubbery around an equipment shelter.

[28] To the extent that the site plan control process simply requires Telus to notify the City and provide reasonable accommodations that do not affect the functioning of the network, it does not appear to have the potential to impair or sterilize Telus' activities to a substantial degree. The City submits that the regulation of the aesthetic and visual qualities of a telecommunications facility through site plan control does not trench upon the management and operations of Telus' overall network. Such requirements would not be unconstitutional. However, as counsel for Telus argued, "Site plan control is much more than shrubs and trees. It is about the design of the site". To the extent that site plan control enables the City to control the placement or siting of wireless towers, or to refuse or significantly delay permission to establish wireless towers, it allows the City to substantially impair Telus' essential activities.

[29] As regards the City's argument that site plan control is necessary to ensure that telecommunications providers consult with the City and advise it of upcoming development, it should be noted that the federal licensing regime requires Telus to seek meaningful consultation with the City before establishing new sites. This being so, the site plan control system is not the City's only means of ensuring that it is consulted.

Conclusion

[30] In terms of Telus' national wireless network, it is vital and essential that each radio station be sited, designed and oriented in a manner that allows the wireless network to function properly. A change in the characteristics of an individual radio station, especially the location and height of the antennas, could critically impair Telus' wireless network thereby compromising its performance and reliability. The application of the East York By-law and the Site Plan By-laws potentially has this effect.

[31] Having found that even if the East York By-law applies only indirectly to Telus' operations, it has the potential to impair, paralyze or sterilize the undertaking, it becomes unnecessary to also decide whether the East York By-law directly purports to regulate the telecommunications industry.

[32] Accordingly, there will be a declaration that the by-laws in question have no effect on or do not apply to Telus' antenna sites.

[33] If the parties cannot agree on the costs of the application, they may make written submissions within 30 days.


LEDERMAN J.

DATE: March 2, 2007