

**PRÉSENTATION DE
RADIO AMATEUR DU QUÉBEC INC.
À
L'OFFICE DE CONSULTATION PUBLIQUE DE MONTRÉAL
concernant le projet de modification du
document complémentaire au plan d'urbanisme.
LES ANTENNES**

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INDUSTRIE CANADA

Industrie Canada est l'organisme fédéral qui régit le spectre de fréquences dans lequel certaines plages sont réservées aux radioamateurs le tout en vertu de la loi sur la radiocommunication, L.R.C., 1985, ch. R-2. Le règlement sur la radiocommunication, DORS/96-484 édicté en vertu de la loi énonce entre autres les normes sur l'exploitation des stations radio autorisées dans le service de radioamateur. De plus, la circulaire d'information renseignements sur le service radioamateur RIC-3 3^e édition juillet 2005 d'Industrie Canada stipule dans son avant propos que:

«Le Règlement sur la radiocommunication décrit le service de radioamateur comme étant un « service de radiocommunication qui a pour objet l'utilisation d'appareils radio pour la formation personnelle, l'intercommunication ou les recherches techniques par des individus qui s'intéressent à la radiotechnique uniquement à des fins personnelles et sans but lucratif .

Le Ministère de l'industrie croit que le service de radioamateur doit être facilement accessible à tous les Canadiens afin que toutes les personnes qui s'intéressent à la science et à l'art de la radiocommunication puissent se prévaloir de toute occasion raisonnable d'apprendre, de profiter, de contribuer ou de participer à ce service. La nécessité pour les opérateurs radio d'avoir des connaissances techniques et de l'exploitation avant d'être autorisés à utiliser les bandes du service de radioamateur est un principe bien établi et reconnu mondialement.»

Enfin, en vertu de l'article 5 (1) f de la loi sur la radiocommunication, Industrie Canada peut édicter des règlements pour:

«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;»

Ce règlement est entré en vigueur le premier janvier 2008 et s'intitule système d'antennes de radiocommunication et de radiodiffusion, CPC-2-0-03 4^e édition entrée en vigueur 1^e janvier 2008. Ce règlement mentionne les conditions de consultation publique nécessaire avant l'installation d'un bâti d'antennes quelle que soit l'utilisation de ces installations; commerciale ou radioamateur.

Cependant, afin de faciliter l'implantation d'un bâti d'antennes pour un radioamateur le règlement prévoit une exclusion à la consultation publique dans les termes suivants:

Pour les types d'installations suivantes, le promoteur est exempté des exigences de consultation du public et de l'autorité responsable de l'utilisation du sol, mais doit quand même remplir les exigences générales énoncées dans la section 7.

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- Nouveaux systèmes d'antennes, y compris les tours, pylônes ou autres bâtis d'antenne, de moins 15 mètres au-dessus du sol.

Cette exclusion a été incorporé au règlement et visait plus particulièrement les installations spécifiques aux radioamateurs.

RADIOAMATEUR

Une personne pour devenir radioamateur doit réussir l'examen de la compétence de base tel que le requiert la réglementation. L'examen de la compétence de base est administré par des examinateurs accrédités par Industrie Canada suivant les exigences stipulées au guide à l'intention des examinateurs accrédités chargés d'administrer les examens menant à l'obtention du certificat d'opérateur radioamateur, CIR-1 6^e édition février 2009. Il existe trois niveaux de compétence radioamateur qu'une personne peut détenir suite à la réussite d'examens.

Une fois détenteur d'une compétence radioamateur, la personne peut demander à Industrie Canada la délivrance d'un indicatif d'appel en conformité de la politique relative aux indicatifs d'appel et aux préfixes pour les évènements spéciaux, CIR-9 2^e édition octobre 2005. Ces indicatifs d'appel pour le Québec commencent par soit VE2 ou VA2.

RADIO AMATEUR DU QUÉBEC Inc.

Radio Amateur du Québec Inc. (RAQI), organisme sans but lucratif (OSBL), a été fondé en 1951 pour regrouper les radioamateurs du Québec afin de défendre leurs privilèges et les représenter auprès des différentes autorités. Aujourd'hui RAQI compte plus de 3500 membres individuels et 45 clubs radioamateurs à travers l'ensemble du territoire du Québec.

RAQI et les radioamateurs collaborent étroitement avec le ministère de la sécurité publique, suite à la signature d'un protocole d'entente de 1978, afin de mettre en place des systèmes de communication lors d'évènements d'urgence ou de catastrophes naturelles lorsque tous les autres systèmes de communications traditionnels sont hors d'usage. Ainsi, RAQI a mis en place un système de remplacement pour les communications lors du verglas de 1998 et des inondations majeures du Saguenay à la demande expresse du ministère.

PROBLÉMATIQUE DES BÂTIS D'ANTENNES POUR LES RADIOAMATEURS

Jusqu'aux années 1980 et 1990, les radioamateurs n'avaient aucune difficulté à ériger leur bâti d'antennes et antennes sur l'ensemble du territoire du Québec. Mais la prolifération des téléphones cellulaires et les coupoles pour la réception de signaux satellites a forcé les municipalités et villes à réglementer l'implantation des immenses bâtis d'antennes pour les cellulaires et l'installation des coupoles domestiques.

Ce faisant la majorité des règlements municipaux sur les bâtis d'antennes et antennes n'avaient aucune provision afin d'exclure les radioamateurs du règlement, puisque régit par les règlements d'Industrie Canada. Cette situation a donc causé plusieurs problèmes aux radioamateurs puisque souvent les règlements limitaient la hauteur des installations à quelques mètres au-dessus du niveau de la rue surtout après les modifications apportées à l'article 113 paragraphe 14.1 de la loi sur l'aménagement et l'urbanisme, L.R.Q., chapitre A-19.1 qui se lit comme suit:

SECTION I

LE RÈGLEMENT DE ZONAGE

113. Le conseil d'une municipalité peut adopter un règlement de zonage pour l'ensemble ou partie de son territoire. Ce règlement peut contenir des dispositions portant sur un ou plusieurs des objets suivants:

14.1° régir ou restreindre par zone l'installation, l'entretien, le nombre et la hauteur des antennes de télécommunication et autres dispositifs semblables;

Dans l'éventualité qu'une municipalité ou une ville place une exemption pour les radioamateurs dans leur règlement de zonage, elles doivent bien comprendre que cette exemption ne vaut que si l'occupant de la propriété sur laquelle le bâti d'antennes est installé est radioamateur. On pourra y placer une disposition dans l'éventualité d'un transfert de propriété pour que le nouvel occupant produise la preuve qu'il est détenteur d'un indicatif d'appel émis par Industrie Canada à défaut de quoi l'installation devra être retirée. Cette NON PERMANENCE de l'installation devrait rassurer les municipalités ou villes qu'aucun droit acquis ne découlera de l'émission d'un permis à cet effet.

POSITION DE RAQI SUR LES BÂTIS D'ANTENNES

En décembre 2006, le gouvernement du Québec, autorisa les municipalités à adopter des règlements municipaux afin de réglementer la hauteur des bâtis d'antennes et des antennes. Le premier janvier 2008, la nouvelle politique sur les antennes d'Industrie Canada entra en vigueur. Ces deux textes législatifs sont à la base des problèmes que

rencontrent les radioamateurs qui désirent ériger une tour pour y installer leurs antennes. En plus de ces deux textes de loi, il faut dire qu'Industrie Canada n'aide pas la résolution des problèmes dans le domaine des demandes d'installation d'antennes.

Dans la politique sur les antennes, Industrie Canada demande à ceux qui désirent installer des antennes de passer à travers un processus de consultation publique et si après avoir tout tenté pour résoudre les différends entre les citoyens, la ville et eux-mêmes, il y demeure un différent, alors Industrie Canada intervient et statue sur l'installation que le demandeur aura droit en fonction de sa licence. Industrie Canada émet donc un document faisant état de l'installation et des conditions de cette installation. Cependant, pour les radioamateurs la politique sur les antennes prévoit une exemption de consultation publique pour une antenne de moins que 15 mètres et cette même politique ne prévoit aucunement qu'Industrie Canada émettra un document au radioamateur afin de démontrer que le radioamateur a rencontré les exigences d'Industrie Canada. Ce manque de document est vraiment problématique puisque les radioamateurs n'ont aucun document de l'autorité réglementaire démontrant qu'il a respecté les normes en vigueur dans ce domaine. Dans un dossier qui se retrouve devant une cour municipale, comme celui de Laval, il serait d'une importance capitale d'avoir un tel document si on se réfère à la cause de la ville de Toronto contre Telus Communications Company¹ (Annexe A) alors que le jugement disait qu'étant donné que l'autorité réglementaire avait autorisé l'installation de Telus, la ville ne pouvait prétendre pouvoir imposer d'autres conditions.

Au début décembre dernier, RAQI a proposé à Industrie Canada d'instaurer un processus allégé pour les demandes d'antennes de moins que 15 M faites par un radioamateur afin de pouvoir émettre un document au radioamateur-demandeur sur les conditions d'installation d'une telle antenne. Ainsi le radioamateur qui se verrait émettre un avis d'infraction aurait un document à remettre à la cour municipale démontrant qu'il est conforme aux exigences de l'autorité réglementaire.

Entre-temps, le conseil d'administration de RAQI à sa réunion du début du mois de décembre 2009 a résolu à l'unanimité de recommander aux radioamateurs qui désirent installer un bâti d'antennes avec antennes de formuler une demande pour une installation DE PLUS QUE 15 M, dans les villes qui limitent la hauteur à moins que 15 mètres sachant très bien qu'un différent s'installera entre le radioamateur et la ville concernée et qu'éventuellement le dossier sera référé à Industrie Canada, comme le prévoit la politique de janvier 2008. Dans les quelques dossiers où Industrie Canada a eu à intervenir concernant des installations radioamateurs, Industrie Canada a presque toujours recommandé 15 M.

¹ Superior court of Justice (Ontario) court file no: 06-CV-310774-PD3 date : 20070302

CONSÉQUENCE DE LA POSITION DE RAQI

Immédiatement après la publication de la position de l'association provinciale, quelques radioamateurs ont formulé des demandes de consultation publique pour l'érection de leur bâti d'antennes et antennes en conformité au règlement d'Industrie Canada.

Ces demandes remontent au printemps 2010 et dernièrement un radioamateur de Rimouski dont le règlement de zonage limitait la hauteur des installations à 7 mètres du niveau de la rue obtenait d'Industrie Canada une autorisation d'ériger (Annexe B) son pylône et antennes à 15 mètres du sol à la base de son installation dans sa cour arrière. Puisque son terrain a une pente ascendante de 4 mètres de la rue vers sa cour, le bâti d'antennes aurait donc été de 3 mètres du niveau de la rue, s'il eu fallu que le règlement municipal s'applique.

Nous sommes toujours en attente de résultats dans les autres demandes.

RAQI n'en reste pas là, un comité d'accompagnement des radioamateurs qui désirent formuler une demande de consultation publique pour leur bâti d'antennes est en formation. Ce comité est nécessaire compte tenu de la complexité d'une telle demande et ce ne sont pas tous les radioamateurs qui ont la connaissance technique pointu pour répondre adéquatement à chacune des questions du processus de consultation publique.

CONSÉQUENCE D'UN RÈGLEMENT RESTRICTIF SUR LA HAUTEUR

Lorsqu'une ville ou une municipalité restreint la hauteur des bâtis d'antennes dans son règlement de zonage cela a de forte conséquence économique pour le radioamateur, la ville et Industrie Canada. En effet, la ville et Industrie Canada doivent attribuer le dossier pour étude et préparation des documents de réponse à cette consultation publique ce qui entraîne des coûts énormes à chacune des instances, mais qui en définitive est supportée par les taxes municipales et les impôts des contribuables. Les conséquences financières pour les citoyens s'en trouvent pour autant couteux.

Une administration municipale responsable verra dans nos recommandations une économie non négligeable pour ses concitoyens.

RAQI RECONNAIT UN DROIT DE RÈGLEMENTATION

RAQI reconnaît que les municipalités et villes ont un droit de regard et de zonage sur l'emplacement où sera érigé les installations du radioamateur sur sa propriété ainsi que

sur la sécurité de ces installations. De plus la municipalité peut exiger que les installations soient toujours dans un bon état visuel. Cette reconnaissance d'un certain droit de zonage à la municipalité va dans l'esprit même du règlement d'Industrie Canada.

Si un règlement devait être adopté pour les structures de radioamateurs, RAQI vous invite à prendre connaissance du règlement de zonage de la ville de Winnipeg appelé «**Communication Facility Protocol**» (Annexe C) qui rencontre bien la vision de RAQI sur le sujet des règlements de zonage sur les bâtis d'antennes et antennes.

RECOMMANDATIONS

Dans le règlement de zonage que la ville de Montréal est à réviser, prévoir:

- D'exclure les radioamateurs du règlement général sur les antennes.
- De faire une section propre aux installations radioamateurs.
- De prévoir un mécanisme de non permanence de l'installation.
- De rencontrer les recommandations de hauteur fixées par Industrie Canada soit 15 mètres.

ANNEX A

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.

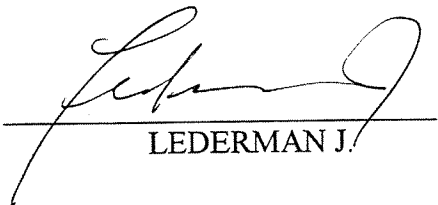
Conclusion

[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

ANNEXE B



Industrie Industry
Canada Canada

Direction générale des opérations
de la gestion du spectre

Spectre, Technologies de l'information
et Télécommunications

5, Place Ville-Marie, 8^e étage
Montréal (Québec) H3B 2G2

Spectrum Management
Operations Branch

Spectrum, Information Technologies
and Telecommunications

5, Place Ville-Marie 8th Floor
Montréal, (Québec) H3B 2G2

Le 27 juillet 2011

COURRIER RECOMMANDÉ

Monsieur Martin Arsenault, ing.
21, Ave des Sources Sud
Le Bic (Québec)
G0L 1B0

Objet: Projet d'un système d'antennes au 21, avenue des Sources Sud, Le Bic (Québec).

Monsieur,

La présente fait suite à votre demande de résolution de litige, déposée le 18 novembre 2010, concernant votre projet d'implantation d'une structure d'antennes située sur le terrain de votre résidence au 21, avenue des Sources Sud, Le Bic.

L'analyse de cette requête a été effectuée à la lumière des informations reçues suite à la consultation des autorités responsables de l'utilisation des sols et du public. Conséquemment, Industrie Canada considère que vous avez satisfait aux exigences de consultation, que vous avez démontré la justification technique de votre projet et que vous avez respecté toutes les autres exigences du processus tel que décrit par la CPC-2-0-03.

Ainsi, le Ministère est d'avis que vous avez satisfait aux conditions de votre certificat d'opérateur radioamateur et ne voit aucune raison vous empêchant de mener à terme votre projet de construction d'un système d'antennes d'une hauteur de 15 mètres au 21, avenue des Sources Sud (coordonnées géographiques: 48° 24' 2" N /68° 38' 32"), Le Bic (Québec).

Espérant le tout à votre satisfaction, veuillez recevoir, Monsieur, nos cordiales salutations.

Cynthia Lalanne
Directrice des opérations
Spectre et Télécommunications
District Ouest

Canada

ANNEXE C



Communication Facility Protocol

(Industry Canada Local Land Use Authority Consultation)

**Adopted by City Council
April 28, 2010**

Prepared by:
Planning Property and Development Department

Last Revised:
March 3, 2010

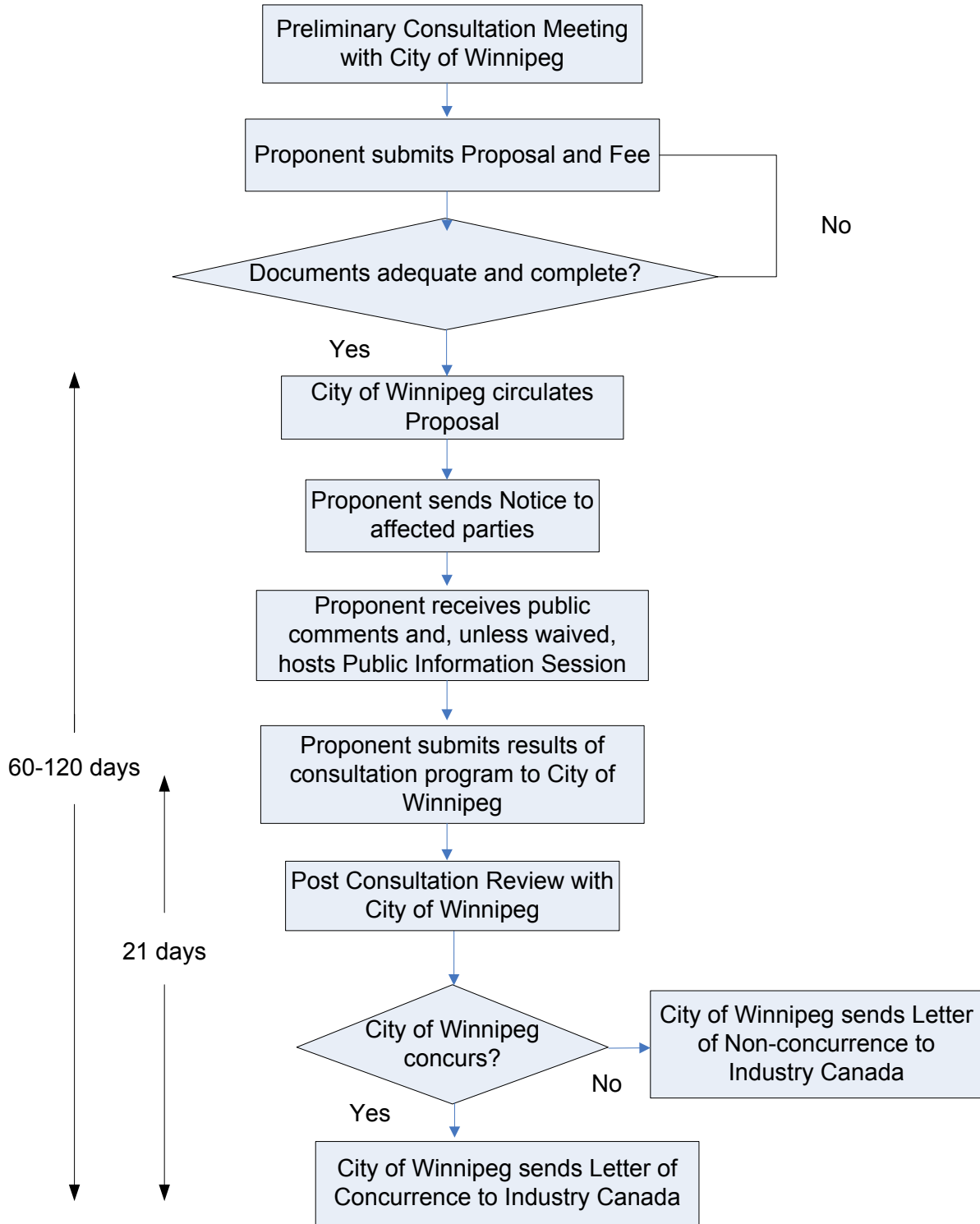
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Figure 1: Communication Facility Protocol Process Flowchart



PURPOSE

1. The purpose of this Protocol is to outline the local land use consultation process and guidelines to be followed in evaluating communication facility proposals within the City of Winnipeg, providing guidance to the communication industry, Industry Canada, City Council, City staff and members of the public. The Protocol will assist in defining the nature and type of implementation tools required to manage the introduction of communication facilities in the city, for example, by-laws, procedures or programs.

OBJECTIVES

2. The objectives of this Protocol are:
 - (1) To establish a siting and consultation process that is harmonized with Industry Canada Radiocommunication and Broadcasting Antenna Systems Client Procedures Circular (CPC-2-0-03) for reviewing communication facility proposals;
 - (2) To set out an objective process, criteria and guidelines that are transparent, consistent and predictable for the evaluation of communication facility proposals that:
 - (a) Minimizes the number of new communication facilities;
 - (b) Discourages new obtrusive facilities within or adjacent to residential areas and other sensitive land uses;
 - (c) Provides an opportunity for meaningful local public consultation with affected property owners; and
 - (d) Allows Industry Canada and the communications industry to identify and resolve any potential land use, siting or design concerns with the City at an early stage in the process.
 - (3) To provide an expeditious review process for communication facility proposals;
 - (4) To establish a local land use consultation framework that allows the City to provide input on all communication facility proposals to proponents and Industry Canada in order that the proponent can satisfy the requirements of Industry Canada regarding local land use consultation; and,
 - (5) To contribute to the orderly development and efficient operation of a reliable, strong radiocommunication network in the city.

DEFINITIONS

3. This section defines terms used throughout this Protocol:

Accessory building, structure, or use means those terms as defined in the Winnipeg Zoning By-law No. 200/06.

Co-location means the placement of communication facility equipment owned and operated by more than one carrier on the same tower or supporting structure. Co-location can also mean the placement of more than one tower on a site.

Communication facility means a range of wireless communication facilities, including freestanding and building-mounted cellular and personal cellular service (PCS) providers and

other point-to-point and point-to-multi-point wireless communication facilities including radio and television broadcasting, using a variety of technologies.

Downtown means all lands covered by the Downtown Winnipeg Zoning By-law No. 100/2004.

Ecologically significant natural lands means natural areas within the City of Winnipeg that are ecologically significant by containing important pockets of natural flora and fauna as identified in the City of Winnipeg Ecologically Significant Natural Lands Strategy and Policy, as amended.

Proponent means a company, organization or person which offers, provides or operates wireless broadcasting or communication services and includes, but is not limited to, companies, organizations or persons which have a radio authorization from Industry Canada.

Safety Code 6 means Health Canada's standards for acceptable human exposure to radiofrequency electromagnetic fields which are outlined in the document "Limits of Human Exposure to Radiofrequency Electromagnetic Fields in the Frequency Range from 3 KHZ to 300 GHZ", as amended.

Unobtrusive means of low visual impact and not undesirably noticeable or conspicuous.

JURISDICTION

4. Under The Radiocommunication Act, the federal government has jurisdiction over inter-provincial and international communication facilities. Industry Canada has been granted the authority to approve and licence the location of communication towers and facilities. Other federal legislation that applies includes: the Canadian Environmental Assessment Act and Health Canada, Safety Code 6 (Limits of Human Exposure to Radiofrequency Electromagnetic Fields in the Frequency Range from 3 KHZ to 300 GHZ, 1999).

In June 2007, Industry Canada issued an update to its Radiocommunication and Broadcasting Antenna Systems Client Procedures Circular (CPC-2-0-03) which outlines the process that must be followed by proponents seeking to install or modify antenna systems, effective January 1, 2008. In addition, in January 2008, Industry Canada published a Guide to Assist Land Use Authorities in Developing Antenna Siting Protocols. The CPC requires that proponents intending to install or modify an antenna system notify and consult with the local land use authority, and the local community in the vicinity of the proposed structure and it sets out a process and timeline for this consultation program.

The role of the City is to provide input and comments to Industry Canada with respect to land use compatibility and a summary of community response to a communication facility proposal. This Protocol is being developed as Council policy to guide the development and installation of communication facilities and establish a community consultation process, where warranted.

PROPOSAL SUBMISSION

5. For a proposed communication facility, the proponent will submit to the City a communication facility proposal and the designated fee.

Proposal Submission Requirements

6. The proponent must include the following information when submitting a communication facility proposal:
 - (1) A letter or report from the proponent indicating the need for the proposal, the proposed site, the rationale for site selection, coverage and capacity of existing communication facilities in the general area and a summary of opportunities for co-location;
 - (2) Colour photograph(s) with the proposed communication facility superimposed;
 - (3) Site Plan showing the proposed development situated on the site;
 - (4) Map showing the horizontal distance between the property boundary of the proposed site and the nearest property in residential use; and
 - (5) For communication facilities requiring public consultation, a map showing all properties located within a radius of three times the height of the proposed communication facility.
7. Upon receipt of a complete proposal submission, the City will circulate the proposal for review and comment to:
 - (1) Affected City Departments,
 - (2) Any municipalities within 500 m (.3 miles) from the base of the proposed communications facility, and
 - (3) The local City Councillor.

Fees

8. The proponent must pay a communications facility submission fee to the City. Fees will be set in accordance with the Planning, Development and Building Fees By-Law No. 166/2004, as amended.
9. The proponent is responsible for securing applicable applications or permissions from City of Winnipeg departments and paying any applicable application fees or charges as required.

CONSULTATION PROCESS

10. The City of Winnipeg's consultation process consists of two phases: consultation with the City of Winnipeg and public consultation, as outlined in Figure 1.

Consultation with the City of Winnipeg

Consultation Meeting

11. The proponent will initiate a preliminary consultation meeting with the City of Winnipeg (Planning Property and Development Department) before a communication facility proposal is submitted.

12. The purpose of the consultation meeting is to identify preliminary issues of concern, identify and agree on requirements for public consultation (including the need for additional forms of notice and a public information session), guide the content of the proposal submission, and identify the need for discussions with any City departments.
13. At the consultation meeting, City staff will provide the proponent with an information package that includes:
 - (1) This Protocol, which outlines the approval process, requirements for public consultation and guidelines regarding site selection, co-location, siting, design and landscaping;
 - (2) Proposal submission requirements included in Sections 5-9;
 - (3) A list of City Departments to be consulted; and
 - (4) Where appropriate, the location of City owned land that should be considered for lease as part of the site selection process.
14. To expedite the review of the proposal, the proponent will review this information package before the submission is made so that the interests of City departments are taken into account. The proponent is encouraged to consult with affected Departments as well as the local City Councillor before submitting the proposal.

Public Consultation

Notice

15. After preliminary consultation with the City of Winnipeg is complete, the proponent will give notice to:
 - (1) All property owners and tenants within a radius of three times the height of the proposed communication facility;
 - (2) Any municipalities within 500 m (.3 miles) from the base of the proposed communications facility;
 - (3) The local City Councillor and Member of Parliament;
 - (4) Director of the Planning Property and Development Department; and
 - (5) Industry Canada regional office.
16. The City of Winnipeg will assist the proponent in compiling a mailing list of property owners/tenants within a radius of three times the height of the proposed communication facility. The City of Winnipeg may charge a fee for this service.
17. The notice will be sent by regular mail, a minimum of 21 days before the public information session, where required, and include:
 - (1) The date, time and location of the public information session;
 - (2) Information on the location, height, type, design and colour of the proposed communication facility, including a 21 cm x 28 cm (8½" x 11") size site plan;
 - (3) The rationale for the selection of the designated site;
 - (4) The name and telephone number of a contact person for the proponent;
 - (5) The name and telephone number of the Local Area Planner at the City of Winnipeg; and
 - (6) A deadline date for receipt by the proponent of public responses to the proposal. Where a public information session is required, the deadline date must be no more than five days before the date of the session. Where a public information session is not required, the deadline date must be at least 14 days after the notices are mailed.
18. The City may also require the proponent, based on local conditions such as a high proportion of rental accommodation in the vicinity of the site, to provide such additional forms of notice as

necessary. The prospect of additional notification will be identified during the preliminary consultation meeting. Other forms of notification may include, but are not limited to:

- (1) A 1.2 m x 2.4 m (4' by 8') large format notice board sign or signs, posted on the site of the proposed communication facility, visible from any roadway abutting the site;
- (2) Publication of the notice in a local newspaper(s); and/or,
- (3) Hand delivery of notices to specified buildings.

Public Information Session

19. The proponent will be responsible for organizing and chairing a public information session. The City of Winnipeg may waive this requirement where, upon consultation with the proponent, the City determines that the anticipated level of public reaction to a proposal will be minimal.
 - (1) An appropriate date, time and location for the public information session will be determined in consultation with the Local Area Planner.
 - (2) The proponent will make available at the public information session an appropriate visual display of the proposal, including a site plan and an aerial photograph of the proposed site.
20. The proponent will provide the City with a package summarizing the results of the public consultation process containing at a minimum, the following:
 - (1) Copies of all letters and other written communications received; and
 - (2) A letter of response from the proponent outlining how all the concerns and issues raised by the public will be addressed, or alternatively, clearly setting out the reasons why such concerns cannot be addressed.

Post Consultation Review

21. The City and the proponent will meet following completion of the public consultation process to discuss the results and next steps in the process.

Consultation Process Timeframe

22. Subject to Section 24, consultation with the City of Winnipeg is to be completed within 60 days of the proposal being accepted by the City of Winnipeg.
23. Subject to Section 24, where public consultation is required, consultation with the City and public consultation are both to be completed within 120 days of the proposal being accepted by the City of Winnipeg.
24. The City may request an extension to the consultation process timeline in writing to the proponent and Industry Canada.

Confirmation of City Position

25. The City will provide a letter to Industry Canada of either:
 - (1) Concurrence. Concurrence would occur if the proposal conforms to the City's requirements as set out within this Protocol and the City's technical requirements, and will include conditions of concurrence, if required. The City will also forward comments on outstanding issues raised during the public consultation process; or,
 - (2) Non-concurrence. Non-concurrence would occur if the proposal does not conform to City requirements as set out within this Protocol. The City will also forward comments on outstanding issues raised during the public consultation process.

26. The Director of Planning Property and Development or his/her delegate will issue the City's letter within 21 days of receipt of the package from the proponent with the results of the public consultation process.

DEVELOPMENT GUIDELINES

Site Selection

27. In general, the City prefers that communication facilities not locate in or near residential areas. Communication facilities should have minimal impacts on living areas and areas of historical or environmental significance. Single operator loaded towers (i.e., monopoles) are generally unobtrusive and of low impact and may therefore be located near living areas. The following design principles and guidelines apply for the siting, location and design of communication facilities.

Co-Location

28. The City encourages proponents to use existing communication facilities wherever feasible (co-location) in order to minimize the impact on the City's urban environment and limit the total number of communication facility sites required. The City recommends that before submitting a proposal for a communication facility on a new site, the proponent explore whether a communication facility could be mounted on a building or structure such as an existing communication facility, hydro transmission tower, utility pole or water tower.
29. The City supports co-location in rural, industrial and some commercial areas of the city as outlined in the sections below. Co-location is discouraged in proximity to residential areas.

Location

30. Communication facilities located within a radius of three times the height of the facility from the nearest residential area should be designed to be unobtrusive, minimizing visual impact and avoiding disturbance to natural features. Communication facilities located outside a radius of three times the height of the facility from the nearest residential area may be co-located. Residential areas are recognized as those areas zoned: RR2 (Rural Residential), R1 (Residential), R2 (Residential), RMF (Residential Multi-Family), RMU (Residential Mixed Use), RMH (Residential Mobile Home Park) under the City of Winnipeg Zoning By-law 200/2006.
31. The City may take the following into consideration when reviewing proposals for the siting of new communication facilities:
- (1) Maximizing the distance of co-located communication facilities from residential areas. The City prefers that obtrusive facilities be located in industrial areas (e.g., areas zoned M2: Manufacturing General and M3: Manufacturing Heavy).
 - (2) Strategically placing communication facilities in the downtown. The City prefers that communication facilities be mounted on buildings or be designed to be unobtrusive.
 - (3) Applying special design treatments to communication facilities proposed to be located within parks and open space areas or on listed heritage buildings and/or sites to make communication facilities unobtrusive.
 - (4) Avoiding ecologically significant natural lands.
 - (5) Avoiding all riverbank lands.
 - (6) Respecting public views and vistas of important natural or manmade features.
 - (7) Ensuring compatibility with significant character areas in the downtown (e.g., Exchange District National Historic Site, The Forks, Legislature).

- (8) Ensuring compatibility with the pedestrian character of neighbourhood main street business areas (e.g., Academy, Corydon, Provencher, Osborne, Selkirk, Main, Ellice, Sargent, West Broadway).
- (9) Minimizing the impact on the natural environment where access and parking are required on-site.

Development and Design Standards

Design

32. The City may take the following into consideration when reviewing proposals for the design of communication facilities:

- (1) Where co-location is not possible, a new communication facility located away from residential areas, as described in Section 30, should be designed with co-location capacity, whenever possible.
- (2) The architectural style of the communication facility should be compatible with the surrounding neighbourhood.
- (3) Where a communication facility is located in close proximity to residential areas, a monopole design is preferred.
- (4) A communication facility may be designed or combined as a landmark feature to resemble features found in the area, such as a flagpole or clock tower, where appropriate, subject to any zoning approvals required for the landmark feature.
- (5) To ameliorate the scale and visual impact of communication facilities, the proponent should consider mitigation measures including: design features, structure type, colour, materials, landscaping, screening and decorative fencing. In general, towers and communication equipment should have a non-reflective surface.
- (6) In the downtown area, the design of communication facilities should generally be unobtrusive and consistent with Downtown Winnipeg Urban Design Guidelines.
- (7) A communication facility may be combined with a new or existing sign supporting structure, subject to any zoning approvals required for the sign.

Height of Freestanding Communication Facilities

33. The City will take the following into consideration when reviewing proposals for the siting of freestanding communication facilities:

- (1) The City prefers that freestanding communication facilities be a maximum of 30 m (100 feet) in height, except in industrial areas. Industrial areas refer to areas zoned M2 (Manufacturing General) or M3 (Manufacturing Heavy) under the Winnipeg Zoning By-law 200/06.
- (2) The City will consider height bonuses over 30 m (100 feet) where communication facilities are co-located up to a maximum of 76 m (250 feet). A new facility may exceed the maximum height of 30 m (100 feet) only if designed to accommodate one additional user's equipment for every 7.6 m (25 feet) of height above 30 m (100 feet).
- (3) Applicants seeking to erect a communication facility greater than 30 m (100 feet) in height, and proposed to be located within 914 m (3,000 feet) of any facility greater than 30 m (100 feet) in height, must provide evidence that reasonable efforts have been made to lease space on an existing planned or constructed facility or that no existing facility will technically satisfy the applicant's needs.
- (4) Height for a freestanding communication facility must be measured from grade to the highest point on the structure, including lighting and supporting structures.

Height of Building-Mounted Communication Facilities

34. Where building-mounted communication facilities will exceed 25% of the height of the existing building, the City prefers that the height not exceed 5.5 m (18 feet) measured from the top of the roof or 1.2 m (4 feet) above the highest point of the elevator penthouse, whichever is higher.

Yards

35. The City recommends that adequate yards separate communication facilities from adjacent development without unduly affecting the development potential of the lot over the lease period.

Parking

36. Parking spaces where provided at each new communication facility site, should have direct access to a public right-of-way at a private approach location acceptable to the City.

Signs

37. Small owner identification signs up to a maximum of .19 sq m (2 square feet) may be posted on communications facilities, equipment shelters or perimeter fencing. No advertising sign or logo is permitted on any communication facility.

Rooftop Equipment

38. Equipment shelters located on the roof of a building should be set back from the roof edge to the greatest extent possible.

Buffering and Screening

39. Buffering and screening requirements are as follows:
 - (1) The City recommends that communication facilities and equipment shelters be attractively designed or screened and concealed from ground level or other public views to mitigate visual impacts.
 - (2) Where adjacent to a principal building, equipment shelters should be constructed of a material similar in appearance to at least one of the materials used in the facades of the principal building and one of the same colours used in the principal building.

Amateur Radio Antenna Support Structures in Residential Areas

40. Development Requirements for amateur radio antenna support structures located in residential areas are as follows:
- (1) No antenna boom or other appurtenance attached to the antenna support structure shall project within .3 m (1 foot) of any property line.
 - (2) Structures should not be illuminated or carry advertising, flags, graphics or other such devices unrelated to the function of an amateur radio antenna support structure, except for warning markings and lights required by any federal or provincial authority.
 - (3) Antenna support structures should not be placed in the front yard.
41. The City prefers that amateur radio antenna support structures not exceed 21 m (69 feet) in height.

Environmental Considerations

42. While it is preferred that siting of communication facilities avoid ecologically significant natural lands, should a proponent still wish to pursue a sensitive site, the City recommends that the proponent address the potential for adverse environmental impacts. Examples where this may apply include, but are not limited to, the following:
- (1) Communication facilities with guy wires or significant height (higher than 61 m or 200 feet) located within 500 m (1,640 feet or .3 miles) of an area designated as ecologically significant natural land in the City of Winnipeg Ecologically Significant Natural Lands Strategy and Policy.

LETTER OF UNDERTAKING

43. The proponent may be required, if requested by the City, to provide a Letter of Undertaking, which may include the following requirements:
- (1) The posting of a security for the construction of any proposed fencing, screening and landscaping;
 - (2) A commitment to accommodate other communication providers on a communication facility, where feasible subject to the usual commercial terms and Industry Canada Conditions of Licence for Mandatory Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements (CPC-2-0-17); and
 - (3) Other conditions of concurrence.

EXCLUDED STRUCTURES

Exemptions from Communication Facility Proposal Review

44. The following are exempt from the requirement to submit a communication facility proposal:
- (1) Maintenance of existing radio apparatus including the antenna system, transmission line, mast, tower or other antenna-supporting structure;
 - (2) Addition or modification of an antenna system (including improving the structural integrity of its integral mast to facilitate sharing), the transmission line, antenna-supporting structure or other radio apparatus to existing infrastructure, a building, water tower, etc.

- provided the addition or modification does not result in an overall height increase above the existing structure of 25% of the original structure's height;
- (3) Maintenance of an antenna system's painting or lighting in order to comply with Transport Canada's requirements;
 - (4) Installation, for a limited duration (typically not more than 3 months), of an antenna system that is used for a special event, or one that is used to support local, provincial, territorial or national emergency operations during the emergency, and is removed within 3 months after the emergency or special event;
 - (5) Facilities less than 15 m (50 feet) in height.

Exemptions from Public Consultation

45. The following types of communication facilities are exempt from the public consultation requirement:
 - (1) All communication facilities which under Section 44 are exempt from the requirement to submit a communication facility proposal;
 - (2) New communication facilities which will be located outside a radius of three times the height of the facility from the nearest residential area; and
 - (3) New communication facilities on top of a building more than 23 m (75.5 feet) in height or having more than 6 stories.