THE ISLAND REGULATORY AND APPEALS COMMISSION
Prince Edward Island
Île-du-Prince-Édouard
CANADA

Docket LA09010
Order LA09-12

IN THE MATTER of an appeal by Catherine Mullally of a decision of the City of Charlottetown, dated May 14, 2009.

BEFORE THE COMMISSION
on Friday, the 20th day of November, 2009.

Maurice Rodgerson, Chair
David Holmes, Commissioner
Anne Petley, Commissioner

Order

Compared and Certified a True Copy

(Sgd.) Philip J. Rafuse

Appeals Administrator
Land, Corporate and Appellate Services Division

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Appearances & Witnesses

Written submissions filed by:

1. For the Appellant Catherine Mullally

Catherine Mullally

2. For the Respondent City of Charlottetown

Counsel:

David W. Hooley, Q.C.

3. For the Developer Rogers Communications Inc.

Counsel:

Murray L. Murphy

IN THE MATTER of an appeal by Catherine Mullally of a decision of the City of Charlottetown, dated May 14, 2009.

Reasons for Order

1. Introduction

[1] The Appellant Catherine Mullally (Mrs. Mullally) has filed an appeal with the Island Regulatory and Appeals Commission (the Commission) under section 28 of the ***Planning Act***, R.S.P.E.I. 1988, Cap. P-8, (the ***Planning Act***). The Appellant's Notice of Appeal was received on June 3, 2009.

[2] This appeal concerns a May 14, 2009 decision of the Respondent City of Charlottetown (the City) to issue a building permit to the Developer Rogers Communications Inc. (Rogers) for the construction of a 45 metre self supporting telecommunications tower with a 10 foot by 10 foot equipment shelter, situate at 185 Mount Edward Road in Charlottetown.

[3] By faxed letter dated June 12, 2009, received June 15, 2009, Counsel for Rogers submitted that the Commission did not have jurisdiction to hear Mrs. Mullally's appeal.

[4] By letter dated June 22, 2009, Commission staff invited the parties to file written submissions and written rebuttal submissions on the issue of whether the Commission has the jurisdiction to hear this appeal.

[5] This Order addresses the issue of whether the Commission has the jurisdiction to hear this appeal.

2. Discussion

The Jurisdictional Issue

[6] In a faxed letter dated June 12, 2009, Counsel for Rogers noted the following:

Pursuant to clause 92.(10)(a) of the Constitution Act (1867), my client's telecommunications facility, and construction thereof, is regulated exclusively by federal law. My client possesses a valid permit, issued by Industry Canada, to construct the facility. No other legal approval is required. The City of Charlottetown's Zoning and Development By-law does not apply to construction of the facility. My client did not apply for a building permit, does not need a building permit, and the City's issuance of a building permit is immaterial. Likewise, any order of the Commission is inapplicable to the construction of my client's facility.

Mrs. Mullally's Submissions

[7] Mrs. Mullally filed a detailed written submission and a rebuttal submission. A very brief summary of her submissions follow.

- On October 23, 2006, Rogers applied to the City for a permit to build a cell phone tower at 185 Mount Edward Road immediately to the west of Mrs. Mullally's home. The City acted within its proper authority when it, on May 14, 2007, denied Rogers' application for a building permit. The City then rejected Rogers' reconsideration request on July 9, 2007.

- In a letter dated February 27, 2009, Industry Canada overstepped its authority in purporting to quash the decisions of the City to deny Rogers' application for a building permit.

- Between February 27, 2009 and May 11, 2009, the record reveals correspondence between the City and Rogers with respect to how the tower would be built.

- At approximately 6:45 a.m. on May 11, 2009, Mrs. Mullally awakened to the sound of heavy equipment rolling down the lane to the proposed tower site. On May 12, 2009, the City issued a stop work order with respect to the ongoing construction of Rogers' tower. That same day, a demonstration of perhaps 50 residents was held. On May 14, 2009, the Supreme Court of Prince Edward Island issued an injunction to prevent "Persons Unknown" from interfering with access to the work site.

- On May 14, 2009, the City granted a building permit to Rogers. It is submitted that the City's decision to issue this permit was as a result of duress from Industry Canada.

- Mrs. Mullally referred the Commission to the Supreme Court of Canada decision 114957 *Canada Ltée (Spraytech, Société d' arrosage)* v. *Hudson (Town)* [2001] 2SCR 241, 2001 SCC 40. Mrs. Mullally cited the principle of subsidiarity, and the precautionary principle, both referred to in the *Spraytech* decision.

- Mrs. Mullally submitted that:

> "… simply because pursuant to federal law and regulation, companies of the ilk of Rogers are authorized to take part in the telecommunications industry, they do not, thereby, have a "blanket authority" to decide where cell towers can be built, they cannot simply put cell towers wherever they wish. Such matters or the latter are clearly within the land-use prerogative of the provincial and subsequently, the municipal government to whom the responsibility (land-use) has been clearly delegated by valid provincial legislation; that is, section 21 and 64 of the ***Charlottetown Area Municipalities Act***."

- In her rebuttal, Mrs. Mullaly submitted that the *Telus* decision is not binding in Prince Edward Island. She further submits that the City of Toronto in the *Telus* decision was attempting to regulate the construction, location and height of the communication towers. In the present appeal before the Commission, Mrs. Mullally's sole issue is the location of Rogers' tower. Mrs. Mullally also submitted:

  Please be assured that the Appellant is not here to discuss the planting of trees and ant-siltation measures. To reduce this proceeding to such trifling matters is to degrade the whole process.

[8] Mrs. Mullally submitted that the Commission has the jurisdiction to hear this appeal and therefore the appeal should proceed to be heard on its merits.

The City's Submissions

[9] The City filed a detailed written submission and a rebuttal submission. A very brief summary of the City's submissions follow.

- The City recognized the application of the inter-jurisdictional immunity principle in the present matter. The City stated that its Zoning and Development Bylaw has no application to the construction, location or height of the Rogers communications tower.

- The City submitted that it does, however, retain jurisdiction over the condition of the land associated with the communications tower site. Site conditions do not impair the essential functioning of Rogers' communications tower.

- The City submitted that the Commission would have appellate jurisdiction in this matter, but only with respect to issues pertaining to the condition of the land associated with the tower site.

[10] The City submitted that the Commission has the jurisdiction to hear this appeal, but that the appeal would be limited in scope to matters that do not affect a "vital, essential or integral part of a federal undertaking".

Rogers Submissions

[11] Rogers filed a detailed written submission and a rebuttal submission. A very brief summary of Rogers' submissions follow.

- Rogers submitted that the construction, siting, and height of its communications tower fall exclusively within the jurisdiction of the federal government. Rogers applied for and obtained permission from Industry Canada to erect the tower. The City has no jurisdiction over any aspect of the tower. The City had no authority to issue a building permit in the first place, because Rogers did not apply for a building permit.

- Rogers submitted in its rebuttal submission that "it did not apply for the Building Permit that is the subject of this appeal". Rogers submitted that the October 23, 2006 building permit application was filed as part of the municipal consultation process required by Industry Canada. The City had rejected an amendment to the CDA Zone, and such an amendment was necessary pre-requisite for the issuance of a building permit. The City's decision to reject this amendment ended the building permit application.

[12] Rogers submitted that the Commission has no jurisdiction to hear this appeal.

3. Findings

[13] After a careful review of the submissions of the parties and the applicable law, it is the decision of the Commission that it does not have the jurisdiction to hear this appeal. The reasons for the Commission's decision follow.

[14] In the various submissions presented to the Commission by the parties, there is considerable confusion with respect to one particular point. Tab 1 of the Record filed by the City reveals an 'Application For City of Charlottetown Building Permit'. This document is dated October 23, 2006, notes the applicant as Rogers Wireless Inc. and is signed by Paul Kiley, solicitor. The development applied for is a "45m self support telecommunications tower with 10 x 10 equipment shelter". In paragraph 19 of Rogers' submission, it acknowledges that it, on October 23, 2006, applied to the City for a building permit. Yet, in paragraph 30 of Rogers' submission, reference is made to section 4.52 of the City's Zoning and Development Bylaw (the Bylaw), and it is noted that a Development Officer may not issue a building permit unless an application has been submitted. Rogers' submission then states "In this case, no application was submitted…".

[15] Paragraph 25 of Rogers' submission states:

> *On May 14, 2009, the City issued a Building Permit to Rogers. Rogers did not apply for <u>this</u> building Permit, and told the City it did not need or want the Building Permit.*
>
> <u>Emphasis added by the Commission</u>

[16] The confusion referred to earlier would appear to be resolved by a very painstaking reading of paragraph 25 of Rogers' submission. In effect, Rogers did apply for <u>a</u> building permit, but it did not apply for <u>this</u> permit.

[17] Painstaking semantics aside, Rogers' rebuttal submission expands on the matter and allows the Commission to piece together what is hopefully a comprehensible summary of Rogers' position on this particular issue. In a nutshell, Rogers applied for a building permit in 2006. In 2007, the City denied a zoning amendment which was necessary before the City could issue a building permit. Later in 2007, the City reconsidered the matter and again denied the zoning amendment which would be required before the permit could be issued. Rogers then considered its permit application to be withdrawn and contacted Industry Canada. Industry Canada gave its approval in February 2009. Rogers believes that the May 14, 2009 building permit was never applied for and is thus contrary to section 4.52 of the City's Bylaw. Therefore, it could be argued that the May 14, 2009 building permit was not lawful and therefore no right of appeal to the Commission existed.

[18] The above argument would be further strengthened if Rogers had filed a letter with the City formally withdrawing its October 23, 2006 building permit application. This would then make it clear to the Commission that Rogers' application was 'off the table'. However, the record before the Commission does not show such a letter. Accordingly, the Commission will not determine its jurisdiction solely based on such a technical argument.

[19] In *Telus Communications Company* v. *Toronto (City)*, (2007) 84 O.R. (3d) 656 (*Telus)*, Lederman J. noted the following:

> *[2] There is no dispute that the Constitution Act, 1867, 30 & 31 Victoria, c. 3 (U.K.) and related jurisprudence provide that 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.*
>
> *…*
>
> *[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.*
>
> *…*
>
> *[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.*
>
> *…*
>
> *[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.*
> *…*
>
> *[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 operation 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 of 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.*
> *…*
>
> *[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. ...*

[20] Mrs. Mullally is correct in saying that the *Telus* decision, a decision of the Ontario Superior Court of Justice, is not binding on the Commission. However, the issues in *Telus* are similar to the present matter, and therefore the Commission finds that the reasoning contained in *Telus* is germane to the present matter.

[21] In the present appeal, both Rogers and the City agree with the reasoning set out in *Telus*. Mrs. Mullally states that *Telus* can be distinguished from the present appeal in that she only takes issue with the location of Rogers' tower, whereas in *Telus* the height and construction of the tower were also at issue.

[22] In Mrs. Mullaly's rebuttal submission, she makes it crystal clear that she has no interest in "trifling matters" such as trees and siltation. This is consistent with her Notice of Appeal, which deals with issues related directly to tower location.

[23] It is the City's position that it does retain some control over "the condition of the land" and that the Commission would accordingly also have jurisdiction to hear an appeal addressing issues pertaining to the condition of the land.

[24] The Commission finds that the reasoning offered in *Telus* is applicable to the present appeal. Mrs. Mullally takes issue with the location of Rogers' tower. That is the focus of her appeal. However, the technical documentation on file supports a finding that the height and location of a radio communications tower are two readily identifiable yet critical characteristics, or parameters, which affect the performance and reliability of Rogers' radio communications tower.

[25] The Commission finds that the location of a radio communications tower is a key technical parameter, clearly within exclusive federal jurisdiction. Industry Canada, not the City of Charlottetown or the Commission, has the necessary technical expertise to evaluate such parameters and the performance and reliability of a radio communications undertaking. Based therefore on both legal jurisdiction and technical expertise, neither the City, nor the Commission has any authority over the height or location of the tower.

[26] While the City and the Commission may have some residual jurisdiction over "the condition of the land", any such jurisdiction needs to be viewed very cautiously. Any such conditions which could impact on the performance or reliability of the radio communications tower are, in the Commission's view, not areas in which the City or the Commission would have jurisdiction.

[27] In the present appeal, the Commission's jurisdiction is framed, in part, by the Notice of Appeal and the position of Mrs. Mullally. The remedy she seeks is the removal of the tower from its present location near her home. The present appeal is concerned with the location of the tower, not the "condition of the land" or a need to provide aesthetic enhancements. The Commission has no jurisdiction to hear an appeal dealing with the location of radio communication towers, and accordingly, the Commission has no jurisdiction to hear this particular appeal.

4. Disposition

[28] An Order will be issued finding that the Commission does not have the jurisdiction to hear this appeal.

IN THE MATTER of an appeal by Catherine Mullally of a decision of the City of Charlottetown, dated May 14, 2009.

Order

WHEREAS the Appellant Catherine Mullally has appealed a decision of the Respondent City of Charlottetown, dated May 14, 2009;

AND WHEREAS the Developer Rogers Communications Inc. questioned, as a preliminary matter, the Commission's jurisdiction to hear this appeal;

AND WHEREAS the Commission invited the parties to file written submissions on the issue of the Commission's jurisdiction to hear this appeal;

AND WHEREAS the Commission has issued its findings on jurisdiction with respect to this matter in accordance with the Reasons for Order issued with this Order;

NOW THEREFORE, pursuant to the ***Island Regulatory and Appeals Commission Act*** and the ***Planning Act***

IT IS ORDERED THAT

1. **The Commission does not have the jurisdiction to hear this appeal.**

DATED at Charlottetown, Prince Edward Island, this 20th day of November, 2009.

BY THE COMMISSION:

(Sgd.) *Maurice Rodgerson*
Maurice Rodgerson, Chair

(Sgd.) *David Holmes*
David Holmes, Commissioner

(Sgd.) *Anne Petley*
Anne Petley, Commissioner

NOTICE

Section 12 of the ***Island Regulatory and Appeals Commission Act*** reads as follows:

> *12. The Commission may, in its absolute discretion, review, rescind or vary any order or decision made by it or rehear any application before deciding it.*

Parties to this proceeding seeking a review of the Commission's decision or order in this matter may do so by filing with the Commission, at the earliest date, a written **Request for Review**, which clearly states the reasons for the review and the nature of the relief sought.

Sections 13(1) and 13(2) of the ***Act*** provide as follows:

> *13.(1) An appeal lies from a decision or order of the Commission to the Court of Appeal upon a question of law or jurisdiction.*
>
> *(2) The appeal shall be made by filing a notice of appeal in the Court of Appeal within twenty days after the decision or order appealed from and the rules of court respecting appeals apply with the necessary changes.*

NOTICE: IRAC File Retention

In accordance with the Commission's Records Retention and Disposition Schedule, the material contained in the official file regarding this matter will be retained by the Commission for a period of 2 years.

IRAC141AA(2009/11)