

Federal Court



Cour fédérale

**Date: 20191209**

**Docket: T-1345-18**

**Citation: 2019 FC 1571**

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

**Montréal, Quebec, December 9, 2019**

**PRESENT: The Honourable Mr. Justice Martineau**

**BETWEEN:**

**VILLE D'OTTERBURN PARK**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**and**

**TELUS COMMUNICATIONS INC.**

**Respondent**

**JUDGMENT AND REASONS**

[1] Despite the opposition of hundreds of residents, the respondent, TELUS Communications Inc. [TELUS], decided to erect a telecommunications tower on green space located in Otterburn Park, in the province of Quebec. The controversial project has been suspended until this Court renders a final decision on the application for judicial review, filed in July 2018 by the applicant, Ville d’Otterburn Park [Town].

[2] The Attorney General of Canada [AGC] and TELUS oppose the Town’s application. The style of cause was amended to remove the reference to the Minister of Innovation, Science and Economic Development as a federal board, commission or other tribunal (section 303 of the *Federal Courts Rules*, SOR/98-106 [Rules]).

[3] Any questions concerning the applicability of provincial environmental legislation to the TELUS project were dismissed earlier this year by the Court, because this particular line of attack had been raised too late by the Town (*Otterburn Park (Town) v Canada (Attorney General)*, 2019 FC 777). The issue in this case is whether the Minister of Industry [Minister] breached duties of procedural fairness and/or otherwise rendered an unreasonable decision by approving the siting of an antenna system and the construction of an antenna support tower [the tower], located at 591 Mountainview Street, in Otterburn Park [the Mountainview site].

[4] For the reasons that follow, the Court finds that the approval of the Mountainview site constitutes a possible, acceptable outcome. Moreover, although there may have been a breach in procedural fairness, there is no basis to quash the impugned decision and refer the matter back to the Minister.

## I. Background

[5] The constitutional jurisdiction of Parliament in matters concerning telecommunications is not the subject of any debate. (See on this point *Rogers Communications Inc v Châteauguay (City)*, 2016 SCC 23 [*Rogers*]).

[6] From a statutory point of view, paragraph 5(1)(f) of the *Radiocommunication Act*, RSC 1985, c R-2, gives the Minister the explicit power to approve the siting and construction of radiocommunication structures set out in this provision:

5(1) Subject to any regulations made under section 6, the Minister may, taking into account all matters that the Minister considers relevant for ensuring the orderly establishment or modification of radio stations and the orderly development and efficient operation of radiocommunication in Canada, [...]

(f) approve each site on which radio apparatus, including antenna systems, may be located, and approve the erection of all masts, towers and other antenna-supporting structures;

[My underlining]

5(1) Sous réserve de tout règlement pris en application de l'article 6, le ministre peut, compte tenu des questions qu'il juge pertinentes afin d'assurer la constitution ou les modifications ordonnées de stations de radiocommunication ainsi que le développement ordonné et l'exploitation efficace de la radiocommunication au Canada : [...]

f) 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;

[Je souligne]

[7] The exercise of federal jurisdiction in the area of telecommunications is also governed by various regulations and the policies of the Department of Innovation, Science and Economic

Development [ISED or Department] (formerly Industry Canada). Moreover, all licensees must comply with various licence conditions, including those set out in Client Procedures Circular CPC-2-0-17 – *Conditions of Licence for Mandatory Roaming and Antenna Tower and Site Sharing and to Prohibit Exclusive Site Arrangements* [CPC-2-0-17].

[8] In practice, the choice of the location of a cell site that hosts an antenna system will depend on the configuration of the telecommunications network and, incidentally, the sites already built on the specific territory to be served. To prevent the proliferation of towers and the disorderly development of antenna systems, sharing of existing radiocommunication facilities should be favoured, subject to the technical feasibility of this latter option. In CPC-2-0-17, the Minister also requires a licensee to facilitate sharing of existing facilities with any competitor that makes such a request of the licensee. In the event of an impasse, it is the Department that will decide the matter.

[9] Furthermore, prior to obtaining approval for a construction project, the requesting telecommunications company [the proponent] must also convince the Department that the procedural requirements set out in CPC-2-0-03 — *Radiocommunication and Broadcasting Antenna Systems* [CPC-2-0-03] have been satisfied, in addition to any other technical or regulatory requirement. Consequently, the Department must be satisfied that the proponent has demonstrated the need to erect the tower in question and that sharing an existing tower with a competitor is not a better alternative. Furthermore, and concurrently, the proponent must consult the local population and the land-use authority [LUA]. According to CPC-2-0-03, these consultations can generally be completed within 120 days. In the event of an impasse between

the parties, CPC-2-0-03 provides that the Department can render a final decision on the issue or issues in dispute.

## II. The TELUS project

[10] TELUS is a telecommunications company that holds several spectrum licenses authorizing TELUS to operate various frequencies in Canada for the purpose of providing wireless telecommunications services—voice, data and messaging (short message service or SMS). In order to ensure adequate network coverage—which includes the territory of Otterburn Park—antenna-supporting towers must be erected at strategic locations [cellular sites] to optimize use of radio waves, particularly on the 700 MHz, 800 MHz, 1900 MHz and 2100 MHz frequency bands.

[11] The Town of Otterburn Park is located in the heart of the Montérégie region, south of the Montréal area. It has roughly 8,000 residents. Nearly all of its territory is used for residences, parks and green spaces. It is bordered by the Richelieu River and the municipalities of Mont-Saint-Hilaire and Saint-Mathias-sur-Richelieu. The municipalities of McMasterville and Beloeil are located on the other side of the river. At the heart of its territory lies Bosquet Albert-Hudon [the Woods], a private, undeveloped wooded area which residents are allowed to use and which the Town considers to be a [TRANSLATION] “conservation area”.

[12] No tower is currently located within the Town’s territory.

[13] On the outskirts, that is to say, outside the Town's territory, TELUS, Vidéotron and Rogers have cellular sites. Notably, on the other side of the Richelieu River, in McMasterville, TELUS already has equipment in a tower that belongs to Vidéotron [Fibrobec site]. The Fibrobec site itself is located roughly 700 metres from a tower belonging to Rogers [Caserne site]. There are also two other cellular sites north of the Town and another cellular site south-east of the Town; these three sites are on the territory of the municipality of Mont-Saint-Hilaire. [See P-9 at page 114 of the applicant's volume 1 for the map].

[14] In 2011, TELUS noted inadequate radio coverage (HSPA and LTE networks) within the territory of Otterburn Park. In January 2012, in compliance with CPC-2-0-03, TELUS entered into discussions with municipal officers and elected representatives to identify a suitable site for a 40-metre tower. After discussing and eliminating several possible sites for various valid reasons, in December 2012, TELUS selected the Mountainview site. This site is on private, vacant land bordered by a public road and the Woods. A total surface area of 251.6 square metres was required, including a turnaround area of 103.6 square metres adjacent to the fenced area where the antenna and its shelter would be located. Roughly 60 trees would be cut down [the initial project].

[15] On May 21, 2013, the Town council rejected the TELUS proposal (resolution 2013-05-144). On September 13, 2013, TELUS came back with an amended project that differed from the initial project as follows. In response to the Town's concerns, the turnaround area would be eliminated, and the fenced site would be reduced. This would reduce the area initially indicated in the initial project by approximately two thirds. The only trees that would be cut down or

removed would be those within the site and at the entrance to the site, and TELUS pledged to reforest both the front of the site after the work was completed as well as the entrance to the site. TELUS also pledged to harmonize the aesthetics of the equipment and the tower so that they would blend into the landscape as much as possible (green colour, burying of wires, etc.) [the environmental and visual mitigation measures].

[16] On November 3, 2013, municipal elections were held in Otterburn Park. The incumbent mayor was defeated. On December 16, 2013, the new council accepted the recommendations of the Town's urban planning advisory committee and expressed support for the implementation of the TELUS project at the Mountainview site (resolution 2013-12-375).

[17] In May 2014, in compliance with CPC-2-0-03, TELUS held an initial public information session about the amended project. The consultation process went on until January 2015. Hundreds of residents of Otterburn Park made their voices heard. A petition with approximately 950 signatures of opponents was filed. Five years later, the opposition movement does not appear to have run out of steam. In November 2019, a group of residents—including several who were wearing [TRANSLATION] “United Against TELUS” t-shirts—attended court hearings in order to show support for the Town.

[18] In the meantime, on June 16, 2014, the municipal council rescinded the resolution of December 2013: the Town was not only opposed to the Mountainview site, but also to the erection of any tower on [TRANSLATION] “any other site” within its territory (council resolution 2014-06-164). The Town's opposition was subsequently reaffirmed on November 16, 2015

(council resolution 2015-11-370), as well as on January 30, 2017 (council resolution 2017-01-018).

[19] Be that as it may, in 2015, the Town mandated François Gagnon, an engineer, to prepare an expert's technical report. He concluded that the Mountainview site was the best possible site, from a technical point of view. Nevertheless, the Town continued to examine various alternative sites with TELUS, but without any apparent progress. For the purposes of this case, the two alternative sites are the following:

- a) the land on which the municipal garage sits, located at 220 Bellevue Street [the garage site]; and
- b) a private lot located near the clearing, right inside the Woods [the clearing site].

[20] On May 11, 2017, TELUS asked the Department to resolve the impasse. We note that TELUS had made an initial request for intervention in June 2016, but that this request had been suspended to allow the parties to reach an agreement.

### III. Departmental intervention

[21] On June 12, 2017, David Parcigneau, Director of Operations, Spectrum Management Operations Branch, Quebec Region, sent a letter to the two parties, in which he detailed the impasse process and invited them to forward and exchange information on a number of specific aspects, within 30 days. After this 30-day period, the Town would be given an additional period of 15 days to submit comments on the information it had been provided by TELUS. After this



comment period, the Department would review the facts and, unless the deadline was extended, render a final decision.

[22] On August 15, 2017, the two parties responded to the Department's request for information and exchanged a certain number of relevant documents at the same time. In particular, the Town informed the Department that the well-being of its citizens and the protection of the environment are always priorities for the Town and that the Town maintained its opposition to the installation of a telecommunications tower at the 591 Mountainview site. The Town explained that [TRANSLATION] "the Town had made significant efforts to identify an alternative site" and criticized [TRANSLATION] "a lack of cooperation [from TELUS] to firm up plans [for the clearing site]". Even though, on April 7, 2017, Quebec's Ministère du Développement durable, de l'Environnement et de la Lutte pour les changements climatiques [MEQ] had issued a negative preliminary opinion concerning the clearing site, the Town indicated that it needed more time to continue procedures involving MEQ. Consequently, the Town asked the Department to extend the deadlines until December 31, 2017. At the same time, the Town informed the Department that it believed that TELUS should first prioritize sharing existing towers and structures, particularly at the Caserne site, for which TELUS had not provided any information.

[23] On August 30, 2017, the Town sent the Department its comments on the information and documents submitted by TELUS on August 15, 2017. The Town complained that MEQ, which is [TRANSLATION] "one of the LUAs having jurisdiction", had not been able to give its opinion on the Mountainview site. At the same time, the Town informed the Department that on August 25,

2017, it had sent a request for opinion to MEQ. Lastly, the Town reiterated that TELUS had still not provided information concerning the sharing of the Caserne site.

[24] On November 5, 2017, municipal elections were held in Otterburn Park, and a new mayor and council were elected (the incumbent mayor did not stand for re-election). A few days after the election, the Department followed up on the request for opinion sent to MEQ. The Department wanted to read the MEQ report when it was made available to the Town. On November 17, 2017, MEQ delivered its opinion on the Mountainview site, which the Town shared with TELUS and the Department a few days later. MEQ was of the opinion that it was not in a position to adequately assess the project's impact on the environment, when additional information was required and an expert report needed to be prepared. In any case, there was a strong possibility that the Mountainview site [TRANSLATION] "had the same environmental sensitivities" as the clearing site, which has a [TRANSLATION] "high ecological value".

[25] On December 20, 2017, representatives of the Department and TELUS held a meeting without the Town, which was not invited. Apparently, during discussion of whether provincial environmental legislation applied, TELUS took advantage of the opportunity to complain about the Town's [TRANSLATION] "stalling tactics" and asked the Department to approve its project without delay.

[26] On February 14, 2018, the Department received a legal opinion from the AGC concerning the application of provincial environmental legislation. The actual content of this legal opinion is subject to solicitor-client privilege. Nevertheless, the Department did not deem it

necessary or appropriate to require TELUS, or any other telecommunications company, to follow the environmental assessment process provided under provincial legislation.

[27] On May 28, 2018, based on the briefing note, Assistant Deputy Minister Fiona Gilfillan made the decision to authorize the construction of an antenna system and the erection of the tower at the Mountainview site. In the meantime, the Minister's office was advised of the decision that had been made on its behalf. On July 3, 2018, the Director of Operations informed TELUS and the Town of the Department's final decision.

#### IV. Decision under review

[28] The impugned decision was communicated to the parties by letters dated July 3, 2018, both of them signed by the Director of Operations.

[29] In the letter addressed to the Town, the Director of Operations noted that TELUS had demonstrated the need to erect the tower in question on the Mountainview site in order to improve its radio frequency coverage within the Town's territory, and to address its current and future technological needs. Moreover, the design of the tower would allow the antennas of other operators to be accommodated when the opportunity arises, and consequently encourage competition in telecommunications services in that community. At the same time, after reviewing all the elements presented, it was the Department's opinion that the process undertaken by TELUS satisfied all the requirements in CPC-2-0-03. TELUS was therefore authorized to erect the tower. However, the project was to be implemented in compliance with

the environmental and visual mitigation measures to which TELUS had committed during consultations with citizens and the municipality and in its dealings with the Department.

[30] In the letter addressed to TELUS, the Director of Operations clarified that following acceptance of the proposed location at the Mountainview site, this facility would be required to comply fully with the notification package provided to citizens and should be completed within a period of three years. The project was also to be implemented in compliance with the environmental and visual mitigation measures to which TELUS had committed during consultations with citizens and the municipality and in its dealings with the Department, following the request for resolution of the impasse filed in August 2017.

#### V. Preliminary motions

[31] On September 19, 2019, the AGC served and filed a notice of motion seeking to strike out the affidavits of Julie Waite, dated November 22, 2018, and François Gagnon, dated November 14, 2018, as well as certain exhibits filed in support of the affidavit of Julie Waite, dated July 13, 2018.

[32] On October 15, 2019, the applicant forwarded a notice of motion seeking dismissal of the objections raised by the respondents during the cross-examination on affidavit of Elisabeth Lander, which took place on February 15, 2019. All answers to questions to which the respondents objected for relevance had been taken under advisement.

[33] The two preliminary motions were presented at the hearing of the application for judicial review held in Montréal on November 18 and 19, 2019. At that advanced stage, two options were discussed: 1) rendering an interlocutory decision before any final judgment; or 2) disposing of all determinative issues concerning admissibility and relevance in the final judgment. Unsurprisingly, counsel for the parties preferred the second option.

[34] It is important to remember that applications for judicial review are summary proceedings, whereas relevance and admissibility are not decided by interlocutory decisions unless the Court finds that it would be otherwise warranted in rendering an advance ruling (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, at para 11 [*Access Copyright*]). In order to secure the just, most expeditious and least expensive determination, I chose the second option. In so doing, I considered the record in its entirety, the submissions of the parties, and the following principles, which it would be helpful to briefly review here.

[35] In principle, parties' records in an application for judicial review are restricted to the evidentiary record that was before the decision-maker or of which the decision-maker took judicial notice (*Access Copyright*, 2012 FCA 22 at para 19). However, there are a number of key exceptions.

[36] In *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128, the Federal Court of Appeal noted the following at paragraph 98:

These cases show that there are three recognized exceptions and the list of exceptions is not closed:

- Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review.
- Sometimes an affidavit is necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can engage in meaningful review for procedural unfairness.
- Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding.

The last two are really just one exception: where a tenable ground of review is raised that can only be established by evidence outside of the administrative decision-maker's record, the evidence is admitted.

[37] Moreover, with respect to affidavits, section 81 of the Rules provides that the alleged facts shall be confined to facts within the deponent's personal knowledge. Moreover, allegations that are abusive or irrelevant or that contain an opinion, arguments or conclusions of law may be stricken or disregarded. With respect to Ms. Waite's affidavit of November 22, 2018, several paragraphs are argumentative—most notably paragraphs 94, 96 to 102, and 108 to 111—and were therefore disregarded.

[38] The AGC also objected to the admissibility of exhibits P-3, P-4, P-32 and P-33 mentioned in Ms. Waite's affidavit dated July 13, 2018. Exhibit P-3 consists of photographs of the Mountainview site and adjacent areas which were taken by Ms. Waite on July 11, 2018, after the impugned decision. Exhibit P-4 is an earlier version of CPC-2-0-03 that had not been in effect since 2014. Exhibits P-32 and P-33 respectively consist of a formal legal demand sent on

July 6, 2018, after the decision, and the acknowledgement of receipt. The photographs of the sites were not before the decision-maker and are, in my view, not useful for the purposes of disposing of this application. With respect to Exhibit P-4, the parties did not raise any particular argument concerning a noticeable difference between the 4th and 5th editions of CPC-2-0-03. In any case, it is the 5th edition which applies and which the Court considered in the context of this case. Exhibits P-32 and P-33 repeat legal arguments or do not add anything to the record; they were also disregarded by the Court.

[39] The affidavit of engineer Gagnon is not admissible as new evidence. That said, insofar as the deponent merely explains his previous involvement as the Town's expert and the contents of the affidavit introduce nothing new, there is no reason not to ascribe limited weight to any relevant contextual element. The Town's questioning of the Caserne site is a fact that was already known by TELUS and the Department. (See, for example, exhibits P-11 at page 7 and P-19 at page 5).

[40] With respect to the AGC's objections to certain questions asked by the Town during Ms. Lander's cross-examination, it is important to remember that it is Ms. Lander, working in collaboration with other government officials, who prepared the briefing note (Exhibit P-38) which served as the rational basis for the impugned decision. Ms. Lander's exact involvement was contested on cross-examination; I will simply note that she is identified in the briefing note as the "originator" of the briefing note. Questions 144, 154 and 259 respectively aim to obtain the documents produced under advisement, namely exhibits EL-21, EL-22 and EL-23. Questions 279 and 301 concern the content of Exhibit EL-21. All these questions, including

exhibits EL-21 to EL-23, are relevant. This evidence provided the Court with information on the meeting on December 20, 2017, and on the entire decision-making process, and allowed the Court to verify the technical elements and other considerations that resulted in the recommendation by Department officials to approve the Mountainview site. In my opinion, the objections concerning questions 160, 165, 168, 170, 173, 175, 176, 194, 203, 204 and 206, also appear to concern Ms. Lander's degree of understanding of certain documents or certain information when she was preparing the briefing note. Finally, all these questions allowed the Court to verify whether or not the impugned decision was based on the evidence on the record (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61).

[41] Consequently, the Court will not ascribe any value to the objectionable paragraphs of the affidavits provided by Ms. Waite and Mr. Gagnon (including the exhibits provided in support of them, where applicable), or to any irrelevant question raised during the cross-examination of Ms. Lander, where applicable. The two preliminary motions are dismissed without costs.

#### VI. Standard of review

[42] The standard of review is not the subject of debate between the parties.

[43] The standard of reasonableness applies to the merits of the impugned decision, (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]). The Court's task is therefore to verify "justification, transparency and intelligibility within the decision-making process" and "whether



the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir* at para 47).

[44] Questions concerning procedural fairness, for their part, are reviewable against the standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

## VII. Reasonableness of impugned decision

[45] The Town highlighted several factual or legal elements which, in its view, justify quashing the ministerial decision and referring the matter back to the decision-maker, and perhaps even granting various declaratory conclusions. Everything is a matter of perspective in the context of this highly complex file. This is not an appeal; it is a judicial review. By inviting the Court to reweigh all of the evidence, the Town is essentially asking the Court to substitute its own assessment for that of the decision-maker. In this case, the applicant has failed to persuade me that the approval of the Mountainview site is not an acceptable outcome.

[46] First, the impugned decision is clear and transparent. It is also based on a set of technical, factual and legal considerations which are relevant in this case. Paragraph 5(1)(f) of the *Radiocommunication Act* gives the Minister broad discretion. In particular, the facts that were brought to the attention of the decision-maker in the briefing note (Exhibit P-38) were not seriously contested by the Town. It is clear, based on the Department’s thorough analysis, that

the approval of the erection of an antenna support tower on the Mountainview site was intended to ensure the orderly development and the operation of cellular radiocommunication.

[47] Second, none of the specific arguments raised by the Town invalidate the decision-maker's general conclusion.

[48] Notably, according to the Town, section 7.4 of CPC-2-0-03 requires that the installation of the tower be done "in a manner that complies with appropriate environmental legislation". Given that the Department disregarded the possibility that the Mountainview site may violate the *Natural Heritage Conservation Act*, CQLR c C-61.01 [the provincial legislation], the applicant maintains that the Department violated CPC-2-0-03. I cannot accept this argument. It is clear, based on the evidence on record, that TELUS did not violate or circumvent any federal environmental legislation. Furthermore, the siting of a telecommunications tower is part of the core of federal power and therefore cannot be impaired by provincial legislation concerning environmental assessment (*Rogers* at paras 69-70).

[49] The Town also claims that MEQ is a LUA within the meaning of CPC-2-0-03, and that the latter should consequently be consulted. This claim has no merit. In the *Guide to Assist Land-Use Authorities in Developing Antenna System Siting Protocols*, published by the Minister, a LUA is defined as follows:

For the purposes of this guide, an LUA means any local authority that governs land-use issues and includes a municipality, town council, regional commission, development authority, township board, band council or similar body . . . .

[Emphasis added.]

[50] Therefore, MEQ is not a “local authority” within the meaning of CPC-2-0-03. It is, rather, a provincial authority, and this finding aligns perfectly with section 1 of the *Act respecting municipal territorial organization*, CQLR, c O-9, which defines the territory of Quebec as comprising, at the local level, the territories of local municipalities.

[51] Let us now address the most hotly contested point of disagreement debated during the hearing, namely, the sharing of any existing cellular site. In this regard, the conclusion—admittedly implicit—that TELUS satisfies all prerequisites for sharing the Caserne site with Rogers, is based on the evidence on record and constitutes an acceptable outcome. One can only conclude that, in the final report he submitted in late May 2015, engineer Gagnon did not express any reservations about the technical data and information provided by TELUS, and it is simply too late at this point for the Town or its expert to complain about the inadequacy of that data and information.

[52] First, there is no doubt that the TELUS cellular network must be carefully planned and deployed across the territory in accordance with various technical parameters and certain technological limitations, in order to optimize network coverage and capacity. According to the final report by engineer Gagnon, the expert mandated by the Town, the Mountainview site (described as “Solution 1”) constitutes the best-case scenario, in other words, the one that will offer optimal cellular coverage for the municipal territory. Nevertheless, the fact remains that the Town and TELUS also considered the possibility of implementing various alternative solutions.

[53] For a short while in 2015, the Town hoped that one alternative that could be explored would be to erect a new tower at the garage site and share the tower at the Caserne site with Rogers. This was “Solution 8” described in the report by engineer Gagnon. However, this solution was ruled out at a very early stage.

[54] In this regard, in an email dated June 2, 2015, Exhibit P-43, the General Manager of the Town, Daniel Desnoyers wrote the following:

[TRANSLATION]

As mentioned during our telephone conversation, the purpose of this email is to confirm our request to assess the coverage that would be obtained in the territory of Otterburn Park if Telus built a telecommunications tower at the municipal garage site located at 120 Bellevue Street and “additionally” used the existing tower, which is currently located in McMasterville, on the other side of the river but “facing” the territory of Otterburn Park. This tower is owned by one of your competitors, but we do not know which one.

This request stems from simulations prepared by the expert, Mr. Gagnon, and filed with the Town. Based on this simulation, the coverage for the territory of Otterburn Park would be equivalent to the coverage obtained with the installation of two towers, one in the agricultural zone and the other on the site of the municipal garage. If the coverage is similar, this would have the “common” advantage of avoiding the construction of a tower in the agricultural zone, thereby resulting in savings for Telus and increasing social acceptability, since only a single tower would be built (thus avoiding potential challenges by residents of the areas bordering the agricultural zone). This could constitute another, even more interesting option than the two-tower one.

[Emphasis added.]

[55] However, in an email dated June 18, 2015, Michel Brosseau, a property manager at TELUS, promptly responded and categorically said no to the Town’s suggestion of using the Caserne site. This option was not feasible for the following reasons:

[TRANSLATION]

Your suggestion of using a competitor's site in McMasterville ("Caserne") rather than our existing site ("Fibrobec") in addition to a 29.5-m site at the municipal garage will have the consequence of creating a major gap in coverage at McMasterville and will not significantly contribute to increasing the coverage in Otterburn Park. You will understand that for these reasons, we are not able to consider this suggestion, because it would not be reasonable for your neighbours.

Therefore, if the Municipality's priority is to decrease the height of the structure to be installed at the municipal garage, it is the option of a 29.5-m structure at the municipal garage and a 40-m structure on agricultural land that remains the best solution.

[56] In fact, from September to November 2015, the parties tried to reach an agreement on the terms and conditions of a lease for the use of the garage site, which would now be combined with a second site on agricultural land located right within the Town's territory (consequently, there was no longer any question of sharing the Rogers tower at the Caserne site). However, as an essential condition of signing the lease in question, the Town required TELUS to undertake not to build this second tower on agricultural land for a period of two years. Naturally, TELUS refused. On November 16, 2015, the Town confirmed its opposition, while also reiterating its general opposition to TELUS building a tower anywhere within the municipality's territory (resolution 2015-11-370). There was an impasse. In a letter dated February 26, 2016, TELUS therefore asked the Department to resolve the impasse. As we will now see, there is enough evidence on record to allow the Department to conclude that the requirements of CPC-2-0-03 were satisfied.

[57] On October 19, 2016, there was a meeting of representatives of the Minister, TELUS and the Town. Even though it was still opposed to the construction of a tower within its territory, the

Town indicated that it was prepared to consider an alternative solution. It was therefore agreed that the resolution process would be suspended. On November 9, 2016, the Town provided TELUS with a list of roughly 15 requirements that would allow it to agree to the construction of a tower at the garage site. The tower in question would not exceed a height of 29.5 metres. The Town also required TELUS to pledge not to build a second tower on the Town's agricultural land for the next 15 years! This was unacceptable for TELUS, which was of the view that [TRANSLATION] "with these conditions, the Town is trying to regulate and dictate the manner in which TELUS should plan, deploy and operate its network, which is unacceptable". On November 24, 2016, TELUS advised the Town that it was going to ask the Department to resume the resolution process.

[58] Nevertheless, from December 2016 to January 2017, the parties continued to negotiate a lease for the garage site. In an email dated January 10, 2017, the Town informed TELUS that [TRANSLATION] "unless you indicate otherwise . . . the current site at 120 Bellevue Street will replace the site located at 591 Mountainview Street". Indeed, on January 13, 2017, TELUS forwarded a draft lease to the Town. However, on January 30, 2017, the Town council adopted resolution 2017-01-018, refusing to enter into the lease in question, much to the dismay of TELUS.

[59] At this point, the Town proposed a brand new option: the construction of a single tower within the municipality's territory at the clearing site located in the heart of the Woods, in order to isolate it from residences. For the purpose of exploring this option, the Town contacted MEQ in order to obtain its opinion on this. On April 7, 2017, MEQ concluded that it would be

preferable for the tower to be built at a location that had already been disturbed, to avoid interfering with one of the Town's last significant woodlands. Moreover, given that this option would require the creation of an asphalt road right up to the centre of the park, the Woods's administration rejected this option; this rejection was formally communicated to TELUS on May 17, 2017. Since it could not obtain a lease for the garage site, and because the option of building a tower at the centre of the park in the Woods had been eliminated, TELUS returned to the initial site, 591 Mountainview Street, and asked the Minister to continue the impasse process and to approve the Mountainview site.

[60] In this case, one can only conclude that the Department did in fact consider the alternative scenarios before making a final decision. In Appendix C to the briefing note dated May 28, 2018 (Exhibit P-38), there is a table entitled "*Current Coverage and Alternative Sites Explored*", while Appendix D to the briefing note is the report by engineer Gagnon from May 2015, which concludes that the Mountainview site is the best technical solution in terms of cellular coverage. The second option was Solution 8, which would combine the garage site and the Caserne site; however, this option was ruled out for various valid reasons.

[61] Exhibit EL-22 includes all of the documents compiled by the Director of Operations for the determination of the impasse. One of these documents appears to be a draft of the briefing note which discusses the feasibility of Solution 8:

[TRANSLATION]

Two scenarios would be able to address the proponent's coverage needs, namely, a site located at the Town's municipal garage used in conjunction with another site and the other scenario, which involves a single site, located at 591 Mountainview, the subject of the request for resolution of an impasse. The Town refused to

approve the installation of a structure at the municipal garage by the proponent. After exhausting all the possible solutions, the proponent was therefore left with just one single property owner who was prepared to accommodate the antenna system on private land (591 Mountainview). . . .

In conclusion, the situation is that there is no other location available for the installation of the site within the proponent's search area which could address the issue of network performance and coverage. There is no possibility of sharing existing structures, owing to the absence of any structure with the necessary height for the project in the immediate vicinity. The closest existing towers are 1.5 km from the proposed tower, and the proponent already has an installation there. The proponent explored other alternative sites but disqualified them because the desired coverage objectives would not be achieved and/or because the land owners approached had refused to accommodate the tower on their lands.

[Emphasis added.]

[62] In previous internal communications, it also appears that Solution 8 was assessed by specialized officers within the Department. In an email to TELUS dated December 5, 2017, Exhibit EL-23, Philippe Tremblay, Spectrum Management Officer, wrote the following:

[TRANSLATION]

Hello everyone,

We have some questions related to the file concerning the impasse in Otterburn Park:

- The Town has informed us that you did not provide a specific response as to why the Caserne site was disqualified. Could you please identify the written communication in which you would have responded to this question?

[63] On December 6, 2017, Mr. Tremblay wrote back to TELUS, indicating that he had found the answer he had been looking for when he examined the documents provided:

[TRANSLATION]



Hello Ms. Jacob,

First, by analyzing the documents initially submitted by the Town that you forwarded to us yesterday, we were able to infer that the Town had already obtained a response about the “Caserne” site in the email sent on June 18, 2015, from Michel Brosseau to Daniel Desnoyers, the general manager of the Town at the time.

[64] In an email dated April 13, 2018, Ms. Lander asked the Director of Operations why the tower at the Caserne site could not be used. In an email dated April 16, 2018, the latter gave her a clear answer:

[TRANSLATION]

[The tower at the Caserne site] would not provide adequate coverage to the East and North-East portion of Otterburn Park (the area to the right of the park as mentioned). Telus already has an installation at a structure less than 700 m from the Rogers Tower (Fibrobec Tower); if Telus installs equipment at the tower at the Caserne site (owned by Rogers) they would need to relocate the equipment at the Fibrobec tower, and this would create gaps in the coverage for McMasterville and would also fail to address the gaps in coverage to the east of Otterburn Park. This solution was assessed by the expert mandated by the Town (François Gagnon, Ph.D., in Scenario #8 of his report), and it could have worked for Otterburn Park if the Town had allowed Telus to install a tower at the municipal garage site, which it refused to do.

[Emphasis added.]

[65] In conclusion, even though this Court may have its own opinion on the probative value of the answers TELUS provided to the Town in June 2015, this does not make the departmental decision in this case unreasonable. Two conditions were essential in order to make Solution 8 possible: 1) the Caserne site must be technically useable by TELUS; and 2) the Town must allow TELUS to install a tower at the garage site. However, according to the evidence on record, in order to implement Solution 8, TELUS would have to move equipment to the Caserne site,

thereby creating a gap in cellular coverage in McMasterville. Moreover, this relocation of equipment will not significantly improve coverage in Otterburn Park. Consequently, if the Town prefers the garage site to the Mountainview site, it will be necessary to build a second tower within the territory of Otterburn Park. Given the Town's refusal to sign a lease for the garage site, it was therefore quite reasonable for the Department to conclude that Solution 8 is not feasible in practice. Furthermore, the clearing site had also been ruled out. It was therefore necessary to return to Solution 1, namely, the Mountainview site.

[66] In all respects, the Court finds that the decision in question is reasonable.

#### VIII. Procedural fairness

[67] The duty of procedural fairness is flexible and variable, depending on the context of the particular statute and the rights affected. In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, the Supreme Court mentions the following five (non-exhaustive) factors:

- a) the nature of the decision being made and process followed in making it;
- b) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
- c) the importance of the decision to the individual or individuals affected;
- d) the legitimate expectations of the person challenging the decision; and
- e) the choices of procedure made by the agency itself.

[68] According to the *Radiocommunication Act*, the approval of the siting of any antenna system is a purely administrative decision, while ministerial discretion is based on a number of relevant considerations left to the appreciation of the Minister. The Department also retains all its investigatory powers. Lastly, the final decision rendered by the Department cannot be appealed.

[69] That said, the impasse resolution process provided in CPC-2-0-03 is jurisdictional or arbitral in nature, insofar as, further to a request for intervention by the proponent or a LUA, the Department is required to make a final decision on the matter in dispute. In this regard, section 5 of CPC-2-0-03 provides that the parties shall have an opportunity to present their respective claims.

[70] With respect to the importance of the decision resolving the impasse for the persons involved, this is not a decision which affects the life or the specific rights of an individual. However, the fact remains that the TELUS project will have an impact on the development of the municipality's territory. The interests of the Town, as an LUA, are necessarily involved. However, the Town and its residents cannot oppose the construction of a tower if the Department is of the opinion that it will improve radiofrequency coverage across the municipal territory and if it will address the current and future technological needs of a telecommunications company (*Rogers* at paras 66-69) (as long as the Department's decision is reasonable, of course, which it is in this case).

[71] With respect to the agency's chosen procedures, suffice it to say that they are flexible and designed to be effective and adaptable to any circumstances. Moreover, the *Radiocommunication*

*Act* gives the Minister full latitude to choose the relevant procedure, and that is what was done in CPC-2-0-03, even though it is not a legal instrument that would limit the exercise of ministerial discretion.

[72] Lastly, with respect to legitimate expectations, CPC-2-0-03 and the letter dated June 12, 2017, create the expectation that the established process would be followed and would be transparent. In this regard, the Town and its residents must be able to express their legitimate concerns and make their preferences known to the telecommunications company before a final decision can be rendered by the Department in the event of an impasse.

[73] The full text concerning the dispute resolution process set out in CPC-2-0-03 is reproduced below:

### **5. Dispute Resolution Process**

The dispute resolution process is a formal process intended to bring about the timely resolution where the parties have reached an impasse.

Upon receipt of a written request from a stakeholder other than the general public, asking for Departmental intervention concerning a reasonable and relevant concern, the Department may request that all involved parties provide and share all relevant information. The Department may also gather or obtain other relevant information and request that parties provide any further submissions if applicable. The Department will, based on the information provided, either:

- make a final decision on the issue(s) in question, and advise the parties of its decision; or
- suggest the parties enter into an alternate dispute resolution process in order to come to a final decision. Should the parties be unable to reach a mutually agreeable solution, either party may request that the Department make a final decision.

Upon resolution of the issue under dispute, the proponent is to continue with the process contained within this document as required.

[Emphasis added.]

[74] With respect to procedural fairness in this case, the Town claims that the Department's follow-up in November 2017 concerning MEQ's position created the legitimate expectation that the Department would not make a decision concerning the impasse until an environmental assessment based on criteria set out in provincial law had been completed. I disagree. It is well established that in order to create legitimate expectations, the representation made must have been "clear, unambiguous and unqualified". That is not the case here. Moreover, for representations to be "sufficiently precise", they must be "sufficiently certain to be capable of enforcement" in the context of a private law contract. (*Canada (Attorney General) v Mavi*, 2011 SCC 30 at paras 68-69).

[75] Subject to what is stated below, it is also clear, based on the evidence on record, that the consultation and exchange of information process provided in CPC-2-0-03 was followed. In particular, the Town had an opportunity to provide written submissions on topics raised in the letter dated June 12, 2017, and to reply to the response provided by TELUS.

[76] That said, after this application for judicial review was filed, the Town learned that on December 20, 2017, there had been a meeting with representatives of TELUS, which it had not been invited to attend. At this meeting, the constitutional applicability of provincial law was allegedly discussed—a fact confirmed by Ms. Lander in her cross-examination. To a lesser degree, the matter of "alternatives" was also allegedly raised in the context of the more general

criticism by TELUS that the Town was using [TRANSLATION] “stalling tactics” to delay the project.

[77] Even if we accept that the Department’s chosen approach to resolving the impasse was flexible and variable in nature, the meeting of December 20, 2017, is of such a nature as to raise legitimate concerns about this particular phase of the impasse resolution process. Moreover, the Town must now rely on Ms. Lander’s statements and some handwritten notes (Exhibit EL-21) to obtain information on what was actually discussed. By agreeing to hold this meeting exclusively with TELUS, the Department may have created the impression that it could resolve the dispute with just one of the two parties, behind closed doors. That is clearly a breach of procedural fairness.

IX. No effective remedy in the circumstances

[78] Admittedly, there may have been a breach of procedural fairness. However, is there reason to set aside the impugned decision and refer the matter back for redetermination?

[79] The AGC argues that not all breaches of procedural fairness are determinative, while TELUS relies on the clean hands doctrine. According to TELUS, the Town has demonstrated an obstructionist attitude since 2012 and has tried to prevent the construction of a tower within its territory by any means necessary, which would be tantamount to an abuse of right, in the absence of a finding that the Town acted in bad faith.

[80] In the Court's opinion, there is no need at this point to pass judgment on the conduct of the parties, which appears to be a perilous exercise in the circumstances (*Corporation des pilotes du Saint-Laurent Central inc v Laurentian Pilotage Authority*, 2018 FC 333 at para 53).

[81] Apart from abuse of right or bad faith, other relevant considerations come into play based on the guidance of the Supreme Court (see *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202; *Maple Lodge Farms Ltd v Canada (Food Inspection Agency)*, 2017 FCA 45 at paras 51-52).

[82] Generally speaking, except for the meeting of December 20, 2017, there was no breach of procedural fairness, and the Town had ample opportunity to present its arguments. More than seven years have elapsed since TELUS presented its project to the Town. The Mountainview site constitutes the best technical option according to the Town's own expert. Public consultations on the project have already taken place. The ongoing opposition of the Town and its citizens to the cellular site project is not a valid ground in law to suspend the project any longer; however, the project will have to be implemented in compliance with the environmental and visual mitigation measures which TELUS promised to take during consultations with citizens and the municipality and in its dealings with the Department.

[83] Simply put, the issue of the social acceptability of the TELUS project is not a factor that this Court can take into consideration in the context of a judicial review of the legality of a decision. The citizens' opposition essentially concerns a public policy choice made by the federal government, namely, prioritizing cellular coverage at the expense of certain considerations

related to the environment or urban planning. In the event of an impasse, it is the Department's responsibility to decide the issues in dispute. The Department did not find any grounds to intervene in this case. The outcome was acceptable.

[84] To sum up, given my findings concerning the reasonableness of the decision, and considering that the Town and the public were consulted and that the Town was able to communicate its preferences on several occasions, a new dispute resolution process will not suddenly make any scenario involving an alternative cellular site to the Mountainview site more feasible in this case. Furthermore, since the applicability of provincial legislation cannot be debated here today before this Court, the issue of whether or not the Town had an opportunity to obtain an environmental expert report from the province is not a determinative factor in this case. There is no effective remedy in the circumstances.

[85] Consequently, in exercising my discretionary power, I believe that it is not appropriate, in the circumstances, to quash the impugned decision and refer the matter back to the decision-maker because the Town was not invited to attend the meeting held on December 20, 2017.

[86] In view of the outcome, this application for judicial review is therefore dismissed with costs.



**JUDGMENT in T-1345-18**

**THIS COURT’S JUDGMENT is as follows:**

1. The style of cause is amended to remove the reference to the Minister of Innovation, Science and Economic Development as a federal board, commission or other tribunal;
2. The two preliminary motions are dismissed without costs; and
3. This application for judicial review is dismissed with costs.

“Luc Martineau”

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Judge

Certified true translation  
This 10th day of January 2020.  
Michael Palles, Reviser

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1345-18

**STYLE OF CAUSE:** VILLE D'OTTERBURN PARK v ATTORNEY  
GENERAL OF CANADA AND TELUS  
COMMUNICATIONS INC. AND MINISTER OF  
INNOVATION, SCIENCE AND ECONOMIC  
DEVELOPMENT CANADA (ISED) [The style of cause  
has been amended.]

**PLACE OF HEARING:** MONTRÉAL, QUEBEC

**DATE OF HEARING:** NOVEMBER 18-19 2019

**JUDGMENT AND REASONS:** MARTINEAU J.

**DATED:** DECEMBER 9, 2019

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